

CUSTOMS BULLETIN AND DECISIONS

**Weekly Compilation of
Decisions, Rulings, Regulations, Notices, and Abstracts
Concerning Customs and Related Matters of the
U.S. Customs Service
U.S. Court of Appeals for the Federal Circuit
and
U.S. Court of International Trade**

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This issue contains:

U.S. Customs Service

T.D. 97-82 **CORRECTION**

General Notices

U.S. Court of Appeals for the Federal Circuit

Appeal No. 96-1272, 96-1275, 96-1276, 96-1310,
96-1322, 96-1345, 96-1359, 96-1397, 96-1436,
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NOTICE

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**Please visit the U.S. Customs Web at:
<http://www.customs.ustreas.gov>**

U.S. Customs Service

Treasury Decision

19 CFR Parts 4, 10, 11, 12, 18, 24, 103, 112, 122, 127, 133,
141, 143, 148, 151, 152, 159, 171, 177, and 191

(T.D. 97-82)

TECHNICAL AMENDMENTS TO THE CUSTOMS REGULATIONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule; correction.

SUMMARY: This document makes a correction to the document published in the Federal Register which set forth various minor technical changes and corrections to the Customs Regulations. The correction involves the wording of the regulatory text contained in the amendatory instruction pertaining to § 11.9.

EFFECTIVE DATE: This correction is effective October 3, 1997.

FOR FURTHER INFORMATION CONTACT: Harold Singer, Regulations Branch, Office of Regulations and Rulings (202-927-2340).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On October 3, 1997, Customs published in the Federal Register (62 FR 51766) as T.D. 97-82 a final rule document setting forth various minor technical changes and corrections to the Customs Regulations. The regulatory amendments included a change to paragraph (b) of § 11.9 (19 CFR 11.9). Although the Background portion of T.D. 97-82 correctly included the word "purchaser" in identifying the affected regulatory text, the amendatory instruction set forth later in the document inadvertently included the word "producer" as part of the amended regulatory text. This document sets forth a new amendatory instruction pertaining to § 11.9 to correct this error.

CORRECTION TO THE FINAL REGULATIONS

On page 51770, in the first column, the amendatory instruction for § 11.9 is corrected to read as follows:

2. In § 11.9, the first sentence of paragraph (b) is amended by removing the words "manufacturer or purchaser of" and adding, in their place, the words "manufacturer or purchaser or".

Dated: October 20, 1997.

HAROLD M. SINGER,
Chief,
Regulations Branch.

[Published in the Federal Register, October 27, 1997, (62 FR 55512)]

U.S. Customs Service

General Notices

TARIFF CLASSIFICATION OF DRILLED SOFTWOOD LUMBER

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Solicitation of comments regarding the commercial uses of wood studs with drilled holes.

SUMMARY: This notice advises the public that Customs is soliciting information about drilled softwood lumber studs that pertains to their classification under the Harmonized Tariff Schedule of the United States (HTSUS).

New York Ruling Letter (NY) B81564, dated February 18, 1997, addressed the classification of studs measuring 2' by 4', and 2' by 6', in lengths of 8 to 10 feet. These studs also featured two one-inch diameter holes drilled in the center of each board about 16 inches from the end. It was indicated that the holes served the purpose of allowing electrical wiring, cables or pipes to be run through the studs during wall construction. Pursuant to NY Ruling Letter B81564 the merchandise was classified in heading 4418, HTSUS, which provides for, among other things, builder's joinery and carpentry of wood.

Since the issuance of NY B81564 Customs' classification of drilled softwood lumber used for structural purposes has been called into question. Generally, it is alleged that Customs' decision could result in circumvention of the "1996 Softwood Lumber Agreement between the Government of the United States of America and the Government of Canada" by shifting certain lumber from heading 4407, which is subject to the Agreement, to heading 4418, which is not subject to the Agreement. Among the questions are: 1) whether the holes that are drilled into the studs actually serve a purpose and cause the studs to be suited to a particular use? 2) whether the drilling of the studs limits their application in construction? 3) whether there are other commercially recognized uses for drilled softwood lumber of heading 4418, HTSUS?

The purpose of this notice therefore, is to solicit information pertaining to the commercial uses of drilled softwood lumber which Customs has classified in heading 4418, HTSUS, which provides for, among other things, builder's joinery and carpentry of wood. This classification is based on the belief that the holes drilled into the wood suit it for certain structural purposes and disqualify it for others.

DATES: Comments must be received on or before December 26, 1997.

ADDRESS: Written comments (preferably in triplicate) may be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Textile Classification Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C., 20229. Comments submitted may be inspected at the Textile Classification Branch, Office of Regulations and Rulings, located at 1300 Pennsylvania Avenue, N.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Classification Branch, (202) 927-2380.

SUPPLEMENTARY INFORMATION:

BACKGROUND

This notice advises interested parties that Customs is soliciting information about the commercial uses of drilled softwood lumber studs. A distinction between drilled lumber and rough or dressed lumber existed in the former Tariff Schedules of the United States (TSUS). This distinction has been carried over to the present Harmonized Tariff so that less processed wood appears at the beginning of Chapter 44, HTSUS, followed by more advanced wood in later headings within the same chapter. Thus, for example, heading 4407, HTSUS, is a general provision for wood that has not been processed in any way, other than provided for under that heading. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN) to heading 4407, HTSUS, state in relevant part:

The products of this heading may be planed (whether or not the angle formed by two adjacent sides is slightly rounded during the planing process), sanded, or end-jointed, e.g. finger-jointed (see the General Explanatory Note to this Chapter).

The EN continue to exclude from the heading "builders' joinery and carpentry" (heading 4418).

Heading 4418, HTSUS, provides for, among other things, builders' joinery and carpentry of wood. The EN to heading 4418 state, in part:

This heading applies to woodwork, including that of wood marquetry or inlaid wood, used in the construction of any kind of building, etc., in the form of assembled goods or as recognizable unassembled pieces (e.g., prepared with tenons, mortises, dovetails or other similar joints for assembly), whether or not with their metal fittings such as hinges, locks, etc.

The term "**joinery**" applies more particularly to builders' fittings (such as doors, windows, shutters, stairs, door or window frames), whereas the term "**carpentry**" refers to woodwork (such as beams, rafters and roof struts) used for structural purposes or in scaffoldings, arch supports, etc., and includes assembled shuttering for concrete constructional work. * * *

"Carpentry" is defined as:

the art of shaping and assembling structural woodwork. *Webster's Ninth New Collegiate Dictionary*, 1991

work which is performed by a craftsman in cutting, framing, and joining pieces of timber in the construction of ships, houses and other structures of a similar character. *Architectural and Building Trades Dictionary*, 1974.

On February 18, 1997, Customs issued NY B81564 classifying drilled softwood studs used for structural purposes in heading 4418, HTSUS. Since the studs were understood to be used for structural purposes, the classification of that merchandise in heading 4418, HTSUS, was consistent with the reference made to "carpentry" in both the EN and a number of consulted lexicographic sources.

We are inviting comments regarding the role of the drilled holes and their function, that is, do the holes limit the use of drilled studs in construction relative to undrilled studs, thus warranting classification in heading 4418, HTSUS? Pending the comment period and the review of comments received in response to this notice no further rulings will be issued by Customs with respect to drilled softwood lumber. Additionally, until the resolution of this issue, we are restricting the determination in NY B81564 to the facts of that specific case, and as such, there should be no reliance by third parties on NY B81564 for prospective or future importations of drilled softwood lumber. Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

COMMENTS

Consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), section 1.4, Treasury Department Regulations (31 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Office of Regulations and Rulings, 1300 Pennsylvania Avenue, N.W., Washington, D.C.

SAMUEL H. BANKS,

Acting Commissioner of Customs.

Approved: September 24, 1997.

JOHN P. SIMPSON,

Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, October 27, 1997 (62 FR 55667)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, October 22, 1997.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
*Assistant Commissioner,
Office of Regulations and Rulings.*

MODIFICATION OF RULING LETTER RELATING TO TARIFF
CLASSIFICATION OF AZINPHOS-METHYL (CAS 86-50-0)

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of Azinphos-methyl (CAS 86-50-0). Comments are invited on the correctness of the ruling.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after January 5, 1998.

FOR FURTHER INFORMATION CONTACT: Robert Cascardo, General Classification Branch (202) 927-2402.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On September 17, 1997, Customs published in the CUSTOMS BULLETIN, Volume 31, No. 37/38, a notice of a proposal to modify New York Ruling Letter (NYRL) A87042 which held that Azinphos-methyl (CAS 86-50-0) is classifiable in subheading 2933.90.1700, HTSUS. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying NYRL A87042 to reflect the proper tariff

classification of Azinphos-methyl (CAS 86-50-0) under subheading 2933.90.0200, HTSUS. Headquarters Ruling Letter 960172, modifying NYRL A87042, is set forth in the attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change in practice or position in accordance with section 177.1(c)(1), Customs Regulations (19 CFR 177.10(c)(1))

Dated: October 21, 1997.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, October 21, 1997.
CLA-2 RR:TC:FC 960172 RC
Category: Classification
Tariff No. 2933.90.0200

Ms. B.C. JARDAK
BAYER CORPORATION
8400 Hawthorn Road
P.O. Box 4913
Kansas City, MO 64120-0013

Re: Modification of NYRL A87042; Azinphos-methyl (CAS 86-50-0).

DEAR Ms. JARDAK:

This letter modifies New York Ruling Letter (NYRL) A87042, dated August 27, 1996, wherein Customs ruled, in part, on the tariff classification of Azinphos-methyl (CAS-86-50-0) imported in bulk form from Germany.

Facts:

This ruling is intended to modify NYRL A87042, and only pertains to the product identified as Azinphos-methyl (CAS 86-50-0), which was classified within subheading 2933.90.1700, Harmonized Tariff Schedule of the United States Annotated (HTSUSA).

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of NYRL A87042 was published on September 17, 1997, in the CUSTOMS BULLETIN, Volume 31, Number 37/38.

Issue:

What is the correct tariff classification for Azinphos-methyl (CAS 86-50-0)?

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI's). The systematic detail of the harmonized system is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may then be applied. The Explanatory Notes

(ENs) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI's.

It has come to our attention that the product identified as Azinphos-methyl, was incorrectly classified in NYRL A87042. In fact, Azinphos-methyl, which has the chemical name of 0,0-Dimethyl S-[4-oxo-1,2,3-benzotriazin-3(4H)-yl)methyl]-phosphorodithioate, is provided for, by name, within subheading 2933.90.0200, HTSUSA.

Holding:

The product identified as, Azinphos-methyl, is properly classifiable within subheading 2933.90.0200, HTSUSA, which provides for "Heterocyclic compounds with nitrogen heteroatom(s) only: Other: Aromatic or modified aromatic: 0,0-Dimethyl S-[4-oxo-1,2,3-benzotriazin-3(4H)-yl)methyl]-phosphorodithioate." This provision is duty free under the general column one rate.

NYRL A87042 is hereby modified.

In accordance with 19 U.S.C. 1625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

This merchandise may be subject to the regulations of the Environmental Protection Agency, Office of Pesticides and Toxic Substances. You may contact them at 402 M Street, S.W., Washington, D.C., 20460, (202) 554-1404, or EPA Region II at (908) 321-6669.

JOHN ELKINS,

(for John Durant, Director,
Tariff Classification Appeals Division.)

PROPOSED REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF "PARENTBANC" ARTICLES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of "ParentBanc" articles under the Harmonized Tariff Schedule of the United States (HTSUS). Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before December 5, 1997.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Mary Beth McLoughlin, General Classification Branch (202) 927-2404.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of articles identified as "ParentBanc," "ParentBanc Jr.," "ParentBanc Deluxe," and "ParentBanc Checkbook Refill Kit". Comments are invited on the correctness of the proposed ruling.

"ParentBanc," consists of a threefold checkbook wallet, a wide-ruled check register pad, two pads of non-negotiable checks, a small calculator, a paper photo identification (ID) card, a clear plastic card holder, and various pieces of non-lithographically printed literature, including "Instructions for Children and Parents." The checkbook wallet has a hook and loop closure and an outer surface of plastic sheeting backed with a woven fabric. Its interior is fitted to contain the check register, check pads, and the ID card with holder. There are two additional card slots and an interior flap pocket with hook and loop closure, in which coins may be carried. "ParentBanc Jr." consists of components similar to those included in the "ParentBanc" article, but has different packaging, contains no threefold checkbook wallet, and its calculator is of lower value. There is only one pad of checks. The check pad and check register are fitted into a checkbook cover of polyvinyl chloride (PVC) plastics. "ParentBanc Deluxe" also consists of components similar to those included in the "ParentBanc" article, but has different packaging and contains three pads of checks, a higher quality calculator, a threefold wallet fitted to carry cards and coins (but not check pads or calculator), and a zippered carrying bag. The check pad and check register are fitted into a PVC checkbook cover. Both the threefold wallet and the carrying bag have an outer surface of cellular plastics backed with a woven fabric. "ParentBanc Checkbook Refill Kit" contains two check pads and a check register.

In Headquarters Ruling Letter (HRL) 958959 dated November 12, 1996, Customs indicated that the various "ParentBanc" articles were not classifiable as educational toys and that the components comprising the articles were separately classifiable under the Harmonized Tariff Schedule of the United States (HTSUS). HRL 958959 is set forth as Attachment A to this document.

We continue to be of the opinion that the articles are not educational toys. However, we now believe that the "ParentBanc Checkbook Refill Kit" is classifiable according to General Rule of Interpretation 1, under heading 4820, HTSUS. Furthermore, we believe that the "ParentBanc", "ParentBanc Jr." and "ParentBanc Deluxe" articles meet the GRI 3, HTSUS, requirements for classification as a set. Therefore, Customs intends to revoke HRL 958959 to reflect the proper classification of the "ParentBanc Checkbook Refill Kit" under subheading

4820.10.4000, HTSUS, which provides for "Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles: Other," and "ParentBanc, ParentBanc Jr., and "ParentBanc Deluxe," under subheading 8470.10.0040, HTSUS, which provides for "Calculating machines and pocket-size data recording, reproducing and displaying machines with calculating functions; accounting machines, postage-franking machines, ticket-issuing machines and similar machines, incorporating a calculating device; cash registers: Electronic calculators capable of operation without an external source of electric power and pocket-size data recording, reproducing and displaying machines with calculating functions, Display only." Proposed HRL 960279 revoking HRL 958959 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: October 16, 1997.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, November 12, 1996.
CLA-2 RR:TC:TE 958959 GGD
Category: Classification
Tariff No. 4202.32.1000, 4202.32.2000,
4202.92.4500, 4817.10.0000, 4820.10.4000,
4901.10.0040, 4909.00.2000, 4911.10.0080,
4911.99.8000, and 8470.10.0040

MR. ROBERT P. SCHAFFER
DE ANGELUS, SCHAFFER & ASSOCIATES
1455 Pennsylvania Avenue, N.W.
Suite 1150
Washington, DC 20004

Re: "ParentBanc" educational articles.

DEAR MR. SCHAFFER:

This letter is in response to your request of November 3, 1995, on behalf of your client, ParentBanc, Inc., concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of articles identified as "ParentBanc," "ParentBanc Jr.," "ParentBanc Deluxe," and "ParentBanc Checkbook Refill Kit," all products of China. Samples were submitted with your original request. Subsequent to your original request and submission, a conference was held with Headquarters personnel on July 12, 1996. An additional written submission, dated July 22, 1996, and additional samples, have been received and considered.

Facts:

The ParentBanc articles are collections of items designed to teach children—ages six to twelve—principles of money management and personal record keeping skills. Parents act as bankers and their children act as bank customers. A child's allowance, gift money, earnings, etc., are entered as direct deposits on a check register without any money changing hands. To obtain money, the child writes a check to the parent who, in turn, provides the amount of money drawn on the account.

The first sample article, identified as "ParentBanc," consists of a trifold checkbook wallet, a wide-ruled check register pad, two pads of nonnegotiable checks, a small calculator, a paper photo identification (i.d.) card (with space for important numbers and names), a clear plastic card holder, and various pieces of nonlithographically printed literature, including "Instructions for Children and Parents." The checkbook wallet has a hook and loop closure and an outer surface of plastic sheeting backed with a woven fabric. Its interior is fitted to contain the check register, check pads, and the i.d. card with holder. There are two additional card slots and an interior flap pocket with hook and loop closure, in which coins may be carried.

The sample identified as "ParentBanc Jr." consists of components similar to those included in the "ParentBanc" article, but it has different packaging, contains no trifold checkbook wallet, and its calculator is of lower value. There is only one pad of checks. The check pad and check register are fitted into a checkbook cover of polyvinyl chloride (PVC) plastics.

The sample identified as "ParentBanc Deluxe" also consists of components similar to those included in the "ParentBanc" article, but it has different packaging and contains three pads of checks, a higher quality calculator, a trifold wallet fitted to carry cards and coins (but not check pads or calculator), and a zippered carrying bag. The check pad and check register are fitted into a PVC checkbook cover. Both the trifold wallet and the carrying bag have an outer surface of cellular plastics backed with a woven fabric.

The sample identified as the "ParentBanc Checkbook Refill Kit" contains two check pads and a check register. Each of the four "ParentBanc" articles is imported in a retail package that is suitable for direct sale without repacking.

Excerpts from advertising and periodical literature submitted indicate that "ParentBanc" articles are marketed and described in a variety of ways, such as: "a fun and educational product," "a wonderful teaching tool," "turns money management into a game," "a way for kids to learn how to make wise decisions about spending and saving," "an excellent tool for parents," and "an excellent opportunity to confront money issues * * * early in a manner that is fun for the kids as well as educational." The items are photographically depicted alongside toys and games on the pages of catalogs including: JC Penney, F.A.O. Schwarz, The Great Kids Company, The Westbury Collection, and Miles Kimball.

Issues:

- 1) Whether the articles, which contain multiple components that allow users to learn principles of money management and personal record keeping skills, are designed principally for amusement.
- 2) Whether the articles constitute sets for classification purposes.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRI.

Heading 9503, HTSUS, provides for "Other toys * * * and accessories thereof," i.e., all toys not specifically provided for in the other headings of chapter 95. Although the term "toy" is not defined in the tariff, the EN to chapter 95 indicate that a toy is an article designed for the amusement of children or adults. The EN to heading 9503 indicate that certain toys, including toy arms, tools, gardening sets, tin soldiers, etc., are often put up in sets, and that collections of items separately classifiable in other headings are classified in

chapter 95 when put up in form clearly indicating their use as toys (e.g., instructional toys such as chemistry sets, sewing sets, etc.).

The recently added "Subheading Explanatory Note to Subheading 9503.70" states in pertinent part that:

for the purpose of this subheading: "sets" are two or more different types of articles (principally for amusement), put up in the same packing for retail sale without repacking. Simple accessories or objects of minor importance intended to facilitate the use of the articles may also be included.

You contend that the "ParentBanc" articles should be classified as educational toy sets. In support of your position, you cite to several Headquarters Ruling Letters (HQ), including HQ 950700, issued August 25, 1993, HQ 957894, issued December 14, 1995, and HQ 958785, issued July 26, 1996.

In Headquarters Ruling Letter (HQ) 950700, issued August 25, 1993, we discussed the circumstances in which certain items may be classified in subheading 9503.70, as toys put up in sets. The case involved the classification of three multiple-component articles—two of which were imported in two separate versions or assortments. Neither assortment of the article identified as a "Minnie 'N Me Looking Pretty Set" included a component that, standing alone, would be classified as a toy. One version consisted of a comb, necklace, sunglasses, and hairclip, and the other was composed of a comb, necklace, mirror, and bracelet. All the components bore a Minnie Mouse decoration.

We stated that the application of the toy set provision is relatively straightforward when each item within a set would individually be classified as a toy, but that a greater challenge arises when the merchandise consists partly or (as in the "ParentBanc" case) entirely of articles that, individually, would be classified elsewhere in the tariff. It was noted that in either instance, subheading 9503.70 encompasses a combination of two or more mutually complementary, complete articles in a retail package, the essential character of which is established by the combination of the items (not by any individual item), and that the components should generally be used together to provide amusement. The facts that advertising was directed toward child-customers and that the goods were sold in toy stores, were not deemed dispositive of either use or classification as toys. We determined, however, that the "Minnie 'N Me" assortments were designed and used principally for amusement. It was possible to envision children mixing, matching, exchanging, etc., the individual items in a temporary and playful manner. It was found that, when put up together, the items were complementary and worked together to provide amusement.

HQ 957894 involved the classification of an article containing the materials needed to make temporary tattoos. The retail package consisted of a combination carrying case/drawing surface, sheets of both tattoo designs and blank tattoo paper, colored markers, a small water applicator bottle, and instructions. Pursuant to GRI 3(b), the article was found to comprise a set classifiable under heading 3926, HTSUS. It was not classified in the toy set provision pursuant to GRI 1, because the components were put up in a form to be primarily used to trace, draw, cut, and transfer a tattoo image—not principally to provide amusement.

In HQ 958785, this office classified a "Lean On Me" activity bolster, which appeared to have a dual purpose, i.e., to function as a pillow or cushion, and to provide amusement to a baby by means of five separate toys attached to the bolster. We concluded that the primary value of the item was its play value, that its utilitarian aspect was temporary and incidental to the amusement factor, and that the item was therefore a toy.

In this case, none of the separately classifiable components of the "ParentBanc" articles is a toy. All of the components are fully functional. Although they are put up in colorful packaging which boldly states that "ParentBanc Is Easy, Fun and Educational," we find that the items in combination are not clearly indicated for use as toys. The type of interplay that was probable among the "Minnie 'N Me" components above is not present. Unlike the items that composed "Tattoo Graphix," the combination of "ParentBanc" items put up together does not indicate a specific activity that, when engaged in, would yield an end product such as a tattoo. It is likely that amusement will, to some degree, be a byproduct of using "ParentBanc" articles, but any amusement factor is incidental to the utilitarian or instructional aspect. As is indicated by the non-toy classification of "Tattoo Graphix," not all merchandise that provides amusement is a toy. We thus find that the "ParentBanc" articles are not designed principally for amusement, but as tools to help parents teach children valuable skills, regardless of the extent to which the process amuses the participants.

The articles are not classified in subheading 9503.70, HTSUS, and cannot be classified by reference to GRI 1 because the individual components are classifiable in several different headings, i.e., headings 8470 (calculators), 4820 (check pads and register pads), 4817 (envelopes), 4202 (flatgoods), and 4911, 4909, and 4901 (printed inserts).

In pertinent part, GRI 2(b) states that:

The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

GRI 3(a) states, in pertinent part, that:

when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

Therefore, to determine under which provision the articles may be classified, we look to GRI 3(b), which states in pertinent part that:

Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

With respect to whether the components of the "ParentBanc" articles constitute "goods put up in sets," we look for guidance to Explanatory Note X to GRI 3(b), which indicates that for purposes of the rule, the term "goods put up in sets for retail sale" means goods which:

- (a) consist of at least two different articles which are *prima facie*, classifiable in different headings;
- (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
- (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

As previously found, the subject articles meet criteria (a) and (c). With regard to criterion (b), it was previously indicated that the combination of "ParentBanc" items put up together does not carry out a specific activity. Each item is used in an ongoing program involving parent and child that may instill an understanding of where money comes from, and develop control over when and where it is spent. We do not find that the process meets a particular need or carries out a specific activity. Therefore, the "ParentBanc" articles do not comprise sets and must be classified in the subheadings applicable to the individual items.

Holding:

The components comprising the articles identified as "ParentBanc," "ParentBanc Jr.," "ParentBanc Deluxe," and "ParentBanc Checkbook Refill Kit," are separately classifiable under the specific subheadings provided below:

The trifold wallet and the trifold checkbook wallet are classified in subheading 4202.32.1000, HTSUSA, the provision for "Articles of a kind normally carried in the pocket or in the handbag: With outer surface of sheeting of plastic or of textile materials: With outer surface of sheeting of plastic: Of reinforced or laminated plastics." The applicable rate of duty is 12.1 cents per kilogram plus 4.6 percent *ad valorem*.

The clear plastic identification card holder is classified in subheading 4202.32.2000, HTSUSA, the provision for "Articles of a kind normally carried in the pocket or in the handbag: With outer surface of sheeting of plastic or of textile materials: With outer surface of sheeting of plastic: Other." The applicable rate of duty is 20 percent *ad valorem*.

The zippered carrying bag is classified in subheading 4202.92.4500, HTSUSA, the provision for "Travel, sports and similar bags: Other." The applicable rate of duty is 20 percent *ad valorem*.

The envelope for refill orders is classified in subheading 4817.10.0000, HTSUSA, the provision for "Envelopes * * * of paper or paperboard * * *: Envelopes." The applicable rate of duty is 3.2 percent *ad valorem*.

The nonnegotiable check pads and check register pads (including PVC fitted checkbook covers) are classified in subheading 4820.10.4000, HTSUSA, the provision for "Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles: Other." The applicable duty rate is free.

The printed leaflet entitled "How To Use ParentBanc" is classified in subheading 4901.10.0040, HTSUSA, the provision for "Printed books, brochures, leaflets and sim-

ilar printed matter, whether or not in single sheets: In single sheets, whether or not folded, Other." The applicable rate of duty is free.

The printed product registration card which states "Thank You For Purchasing * * *" is classified in subheading 4909.00.2000, HTSUSA, the provision for "Printed or illustrated postcards; printed cards bearing personal greetings, messages or announcements, whether or not illustrated, with or without envelopes or trimmings: Postcards." The applicable rate of duty is 3.2 percent *ad valorem*.

The printed leaflet entitled "Children Love To See Their Name In Print" is classified in subheading 4911.10.0080, HTSUSA, the provision for "Other printed matter, including printed pictures and photographs: Trade advertising material, commercial catalogs and the like, Other." The applicable rate of duty is free.

The printed identification card is classified in subheading 4911.99.8000, HTSUSA, the provision for "Other printed matter, including printed pictures and photographs: Other: Other: Other: Other." The applicable rate of duty is 3.9 percent *ad valorem*.

The battery-powered calculators are classified in subheading 8470.10.0040, HTSUSA, the provision for "Calculating machines * * *: Electronic calculators capable of operation without an external source of electric power and pocket-size data recording, reproducing and displaying machines with calculating functions, Display only." The applicable rate of duty is 2.9 percent *ad valorem*.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.
CLA-2 RR:CR:GC 960279 MMC
Category: Classification
Tariff No. 4820.10.4000 and 8470.10.0040

MR. FRANCIS BRENNAN
DE ANGELUS & ASSOCIATES
1455 Pennsylvania Avenue, N.W.
Suite 1150
Washington, D.C. 20004

Re: HRL 958959 revoked; "ParentBanc" Educational Articles; ENs 95.03, Rule 3(b)(X) and GR 3; HRLs 083048, 083257, 084927, 085758, 086577, 086649, 087599, 088086, 088494, 088694, 088983, 951507, 955845, 956309, 956518 and 958785.

DEAR MR. BRENNAN:

This is in reference to your February 6, 1997, request for reconsideration of Headquarters Ruling Letter (HRL) 958959 dated November 12, 1996, on behalf of ParentBanc Inc., concerning articles known as "ParentBanc", "ParentBanc Jr.", "ParentBanc Deluxe" and "ParentBanc Checkbook Refill Kit." In HRL 958959 you were advised that the articles did not meet the requirements to be considered "toy sets" as provided for in the Harmonized Tariff Schedule of the United States (HTSUS). As the "ParentBanc", "ParentBanc Jr.", "ParentBanc Deluxe," and "ParentBanc Checkbook Refill Kit," did not meet the toy set definition you were directed to separately classify each component of the various articles. Samples were submitted with your original request. In preparing this discussion, consideration was given to the views expressed in the meeting held with Headquarters personnel on June 24, 1997.

Facts:

The ParentBanc articles are collections of items designed to teach children, ages six to twelve, principles of money management and personal record keeping skills. Parents act as bankers and their children act as bank customers. A child's allowance, gift money, earnings, etc., are entered as direct deposits on a check register without any money changing

hands. To obtain money, the child writes a check to the parent who, in turn, provides the amount of money drawn on the account.

The first sample article, identified as "ParentBanc," consists of a threefold checkbook wallet, a wide-ruled check register pad, two pads of non-negotiable checks, a small calculator, a paper photo identification (i.d.) card, a clear plastic card holder, and various pieces of non-lithographically printed literature, including "Instructions for Children and Parents." The checkbook wallet has a hook and loop closure and an outer surface of plastic sheeting backed with a woven fabric. Its interior is fitted to contain the check register, check pads, and the i.d. card with holder. There are two additional card slots and an interior flap pocket with hook and loop closure, in which coins may be carried.

The sample identified as "ParentBanc Jr." consists of components similar to those included in the "ParentBanc" article, but has different packaging, contains no threefold checkbook wallet, and its calculator is of lower value. There is only one pad of checks. The check pad and check register are fitted into a checkbook cover of polyvinyl chloride (PVC) plastics.

The sample identified as "ParentBanc Deluxe" also consists of components similar to those included in the "ParentBanc" article, but has different packaging and contains three pads of checks, a higher quality calculator, a threefold wallet fitted to carry cards and coins (but not check pads or calculator), and a zippered carrying bag. The check pad and check register are fitted into a PVC checkbook cover. Both the threefold wallet and the carrying bag have an outer surface of cellular plastics backed with a woven fabric.

The sample identified as the "ParentBanc Checkbook Refill Kit" contains two check pads and a check register. Each of the four "ParentBanc" articles is imported in a retail package that is suitable for direct sale without repackaging.

Excerpts from advertising and periodical literature submitted indicate that "ParentBanc" articles are marketed and described in a variety of ways, such as: "a fun and educational product," "a wonderful teaching tool," "turns money management into a game," "a way for kids to learn how to make wise decisions about spending and saving," "an excellent tool for parents," and "an excellent opportunity to confront money issues * * * early in a manner that is fun for the kids as well as educational." The items are photographically depicted alongside toys and games on the pages of catalogs including: JC Penney, F&A-O Schwarz, The Great Kids Company, The Westbury Collection, and Miles Kimball.

Issues:

- 1) Whether the articles are considered "educational toys" for tariff purposes.
- 2) Whether the articles constitute sets for classification purposes.

Law and Analysis:

Classification under the Harmonized Tariff Schedule of the United States (HTSUS), is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

The tariff provisions under consideration are as follows:

9503	Other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof.
9505	Other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof
4202.31	Articles of a kind normally carried in the pocket or in the handbag
4817	Envelopes, letter cards, plain postcards and correspondence cards, of paper or paperboard; boxes, pouches, wallets and writing compendiums, of paper or paperboard, containing an assortment of paper stationery
4820	Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles
4901	Printed books, brochures, leaflets and similar printed matter, whether or not in single sheets
4909	Printed or illustrated postcards; printed cards bearing personal greetings, messages or announcements, whether or not illustrated, with or without envelopes or trimmings

- 4911 Other printed matter, including printed pictures and photographs
 8470 Calculating machines and pocket-size data recording, reproducing and displaying machines with calculating functions; accounting machines; postage-franking machines, ticket-issuing machines and similar machines, incorporating a calculating device; cash registers

The term "toy" is not defined in the tariff. In understanding the language of the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive, or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. See, T.D. 89-90, 54 Fed. Reg. 35127, 35128 (August 23, 1989). General ENs to Chapter 95 of the HTSUS states, in pertinent part, that: "This Chapter covers toys of all kinds whether designed for the amusement of children or adults * * *." EN 95.03 states, in pertinent part, that:

This heading covers:

- (A) All toys not included in headings 95.01 and 95.02.

* * * * *

These include:

* * * * *

- (17) Educational toys (e.g., toy chemistry, printing, sewing and knitting sets).

* * * * *

Certain of the above articles (toy arms, tools, gardening sets, tin soldiers, etc.) are often put up in sets.

* * * * *

Collections of articles, the individual items of which if presented separately would be classified in other headings in the Nomenclature, are classified in this Chapter when they are put up in a form clearly indicating their use as toys (e.g., instructional toys such as chemistry, sewing, etc., sets).

* * * * *

You contend that the "ParentBanc" articles should be classified as educational toy sets, pursuant to the application of GRI 1, under heading 9503, HTSUS, or in the alternative as a general set pursuant to the application of GRI 3.

The EN term "educational toy" was first introduced with the adoption of the HTSUS in 1989. Prior to 1989, such articles were not considered with in the scope of the tariff term "toy." Such articles were believed to be advanced in condition or "more than" toys because they provided an element (education) other than amusement.

Customs has identified a series of characteristics, which are indicative, but not determinative of articles which are considered "educational toys" classifiable in heading 9503, HTSUS. The criteria were identified by examining the exemplars provided in the ENs of educational toys and determining what universal characteristics they had. Our examination indicated that educational toys rely on or have:

1. **self-learning:** This characteristic incorporates the idea that natural curiosity spurs continued use of the article.
2. **creative imagination.**
3. **trial and error:** This characteristic manifests itself in the inclusion of example instructions or experiments to follow to create an end product. Such articles lack clear positive reinforcement for the completion of the tasks outlined.
4. **independent play value:** This characteristics incorporates the idea that the article has play value independent of any learning which may or may not occur when using the article. We note that it has been Customs experience that generally, for an article to have play value independent of its educational feature, it must have some form of manipulative play value.

Examples of articles which are considered "educational" toys for tariff purposes include chemistry sets and most baby toys such as activity quilts, busy boards, etc.

Chemistry sets are considered educational toys for tariff purposes because a child's natural curiosity about the combination of elements is what generally spurs the article's use. Additionally, a child can use their own imagination or knowledge to create different combinations of elements and view different things with the various tools provided in a chemistry set. Moreover, chemistry sets generally provide instructions and experiments which may be followed. However, even if the instructions are not followed and no science is learned, a child can still manipulate the various articles, (microscope, chemicals, petri

dishes) to pretend he is a scientist. See HRL 083048 dated October 12, 1989, and 084927 dated September 20, 1989, classifying chemistry sets.

Additionally, articles such as rattles, crib mirrors, and activity quilts are considered within the scope of the term "educational toy" because they serve as basic tools to aid in developing motor skills, sensory perception, hand-eye coordination, crawling, sitting, reaching, etc. It is a baby's natural curiosity about one of the above articles which spurs the learning of the listed skills. Many of the listed toys require the trial and error of discovering how to manipulate one of the listed articles so that it initiates a sound (shaking a rattle). Although the baby is learning he/she does not know that. They are merely having fun discovering new things. See HRLs 083257 dated February 21, 1990, 088983 dated August 12, 1991, 956309 dated August 19, 1994, and 958785 dated July 26, 1996.

Not all articles with educational elements are considered "educational toys" for tariff purposes. Articles which act primarily as surrogate instructors are not considered educational toys for tariff purposes. The act of surrogate instruction involves the giving of instructions or asking of questions and the confirmation of the correct answer. Such confirmation may have an element of "positive reinforcement" such as a pleasant sound versus a "sour" note. Unlike a child's own natural curiosity in an educational toy, it is this positive reinforcement which is offered to keep the child interested in the process. Articles with educational elements create no end product in and of themselves. It is the question/answer or record keeping, etc., the process itself, which provides the article's purpose. Examples of such educational articles include flash cards, and the various educational electronic learning devices classified in HRLs 085758 dated January 2, 1990, 086577 dated May 4, 1990, 086649 dated May 4, 1990, 087599 dated March 5, 1991, 088086 dated February 7, 1991, 088494 dated April 19, 1991, 088694 dated July 10, 1991, 951507 dated July 2, 1992, 955845 dated August 22, 1994, and 956518 dated September 22, 1994.

We are of the opinion that the various "ParentBanc" articles function like an educational article rather than an educational toy. No self-learning exists when the ParentBanc products are used. Rather an instructional mode is created by the child approaching a parent banker with a "check" to make an actual withdrawal of their own money: either the amount for withdrawal exists or it does not. Furthermore, no trial and error characteristic exists as accurate records must be kept so that both the adult and child can be aware of the "account's" balance. A child cannot experiment by entering any old number into the register or writing a check for any conceivable amount, as this would destroy the accuracy of the balance and defeat the stated purpose of teaching money management. Finally, the ParentBanc articles have little if any independent or manipulative play value.

A child can not role play "banker" keeping a bank account balanced; it either is or it is not. "Pretending" would cause the account of the child's real money to be inaccurate. It requires adult interaction and supervision to function. Moreover, the only possible manipulative play value, independent of the article's educational aspects, is writing, specifically numbers. Customs has never considered writing, coloring, drawing or painting to be "manipulative play value." Nor does Customs classify the tools for writing, coloring, drawing or painting as toys since those tools are not designed to amuse.

Although heading 9503, HTSUS, does not describe the "ParentBanc Checkbook Refill Kit", the "ParentBanc Checkbook Refill Kit" nonetheless consists of components all described by heading 4820, HTSUS. Therefore, it is classifiable according to GRI 1, under subheading 4820.10.4000, HTSUS, which provides for "Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles: Other."

Inasmuch as the "ParentBanc," "ParentBanc Jr." and "ParentBanc Deluxe" are not described by heading 9503, HTSUS, and two or more headings, describe their various components, they cannot be classified according to GRI 1.

GRI 2(a) is inapplicable because it applies to incomplete or unfinished articles, and the ParentBanc articles are imported in a finished complete condition. GRI 2(b) states, in pertinent part, that any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. The classification of goods consisting of more than one material or substance shall be according to the principles of GRI 3.

GRI 3 states that when, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

- (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

As the above mentioned headings describe only one particular component of the ParentBanc set, the headings are considered equally specific and GRI 3(b) must be examined.

EN Rule 3(b)(X) (pg. 4), provides a three-part test for "goods put up in sets for retail sale":

For the purposes of this Rule, the term 'goods put up in sets for retail sale' shall be taken to mean goods which:

- (A) consist of at least two different articles which are *prima facie*, classifiable in different headings * * *;

- (B) consist of products or articles put up together to meet a particular need or carry out a specific activity; and

- (C) are put up in a manner suitable for sale directly to users without repackaging (e.g., in boxes or cases or on boards).

"ParentBanc," "ParentBanc Jr." and "ParentBanc Deluxe" comprise sets put up for retail sale. Their various components are classifiable under different headings. Each of the articles is put up together to meet the need of teaching children how to manage their own money. Finally, all are imported in a condition which is suitable for sale directly to consumers without repackaging.

GRI 3(b) states:

- (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

According to EN GR 3, pg. 4, the factor which determines essential character will vary as between different kinds of goods. It may for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods. We are of the opinion that none of the various components of the "ParentBanc," "ParentBanc Jr." and "ParentBanc Deluxe" articles provides an essential character. Each of the components work together in concert to perform the goal of teaching children how to manage their money. Because none of the components constitute an essential character, GRI 3(c) must be applied.

GRI 3(c) states:

- When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

The heading which appears last in numerical order for the "ParentBanc," "ParentBanc Jr." and "ParentBanc Deluxe" is heading 8470, HTSUS. Classification to the 10 digit level will be under subheading 8470.10.0040, HTSUS, which provides for "Calculating machines and pocket-size data recording, reproducing and displaying machines with calculating functions; accounting machines, postage-franking machines, ticket-issuing machines and similar machines, incorporating a calculating device; cash registers: Electronic calculators capable of operation without an external source of electric power and pocket-size data recording, reproducing and displaying machines with calculating functions, Display only."

Holding:

The "ParentBanc Checkbook Refill Kit" is classifiable under subheading 4820.10.4000, HTSUS, which provides for "Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles: Other." The 1997 general column one duty rate is free.

The "ParentBanc," "ParentBanc Jr." and "ParentBanc Deluxe" is classifiable under subheading 8470.10.0040, HTSUS, which provides for "Calculating machines and pocket-

size data recording, reproducing and displaying machines with calculating functions; accounting machines, postage-franking machines, ticket-issuing machines and similar machines, incorporating a calculating device; cash registers: Electronic calculators capable of operation without an external source of electric power and pocket-size data recording, reproducing and displaying machines with calculating functions, Display only." The 1997 general column one duty rate is 2.6% *ad valorem*.

HRL 958959 is revoked.

JOHN DURANT,
Director,
Commercial Rulings.



U.S. Court of Appeals for the Federal Circuit

SGI, INC., PLAINTIFF-APPELLANT v. UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 96-1272

(Decided September 5, 1997)

Ralph H. Sheppard, Meeks & Sheppard, of New York, New York, argued for plaintiff-appellant. With him on the brief were *Jeffrey A. Meeks* and *Lisa Levaggi Borter*.

Barbara M. Epstein, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, International Trade Field Office, of New York, New York, argued for defendant-appellee. With her on the brief were *Frank W. Hunger*, Assistant Attorney General and *David M. Cohen*, Director, Department of Justice, of Washington, DC. Also with her on the brief was *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, of New York, New York. Of counsel on the brief was *Karen P. Binder*, Assistant Chief Counsel, International Trade Field Office, of New York, New York.

Steven P. Florsheim, Grunfeld, Desiderio, Lebowitz & Silverman LLP, of New York, New York, for amicus curiae Arrow Trading.

Appealed from: United States Court of International Trade.

Chief Judge CARMAN.

Before RICH, NEWMAN, and PLAGER, Circuit Judges.

RICH, Circuit Judge.

SGI Incorporated (SGI) appeals from a decision of the United States Court of International Trade rendered on cross motions for summary judgment in which the Court of International Trade classified SGI's portable soft-sided vinyl coolers under subheading 4202.92.90 of the Harmonized Tariff Schedule of the United States (HTSUS), which carries a 20% *ad valorem* tax. We reverse.

BACKGROUND

SGI imports "Chill" coolers from Taiwan, China, and Hong Kong. It is undisputed that the "Chill" coolers at issue are portable soft-sided vinyl insulated coolers with handles or straps used for storage of food or beverages, for maintaining a cold temperature over time, and for carrying such coolers from place to place. The coolers' insulative properties are similar to both hard and soft-sided coolers, and the coolers' insulative material consists of a polyethylene closed cell foam approximately one

half inch thick between an outer and inner vinyl shell surrounding the storage compartment of the cooler. Plastic is the component material of chief value.

The Court of International Trade also found that the coolers at issue in this case were identical to the coolers at issue in *Sports Graphics, Inc. v. United States*, 24 F.3d 1390 (Fed. Cir. 1994), decided under the Tariff Schedules of the United States (TSUS) which preceded the HTSUS. The Court of International Trade found that:

In *Sports Graphics*, Customs had classified plaintiff's coolers as "Other" articles of "luggage" under item 706.62, TSUS, pursuant to the definitional Headnotes 2(a)(i) and (ii) of Schedule 7, Part 1, Subpart D. Plaintiff claimed, and the CIT agreed, that the merchandise was not *ejusdem generis* with the TSUS luggage exemplars because "the chief use of the Chill cooler, as with the general class of 'coolers,' is to maintain food and beverages at a desired temperature over a period of time. Such a use is a storage function.) Accordingly, the coolers were properly dutiable under item 772.15, TSUS, as "articles chiefly used for preparing, serving, or storing food or beverages. Other." On appeal, the CAFC affirmed, holding with respect to *ejusdem generis*:

The trial court concluded that when determining the classification of the merchandise at issue here, under a proper analysis, the focus should be on whether food or beverage is involved. We agree. In focussing on whether food or beverage is involved, it is clear that the merchandise has a different purpose, the storage of food or beverage, which precludes the merchandise from being *ejusdem generis* with the exemplars listed in headnotes 2(a)(i) and 2(a)(ii) of the luggage provision.

SGI, Inc. v. United States, 917 F. Supp. 822, 825-26 (Ct. Int'l Trade 1996) (citations omitted) (quoting *Sports Graphics*, 24 F.3d at 1393).

The United States Customs Service (Customs), however, classified the coolers under Heading 4202 of HTSUS that is comparable to the "luggage" provision of the TSUS, which was rejected by the Federal Circuit as an improper classification in *Sports Graphics*. Customs classified the coolers under subheading 4202.92.45, HTSUS, covering travel, sports and similar bags with an outer surface of textile materials, with a schedule duty rate of 20% *ad valorem* tax. The Court of International Trade found Customs' classification inapplicable and classified the coolers under an alternative classification suggested by Customs, subheading 4202.92.90, covering items similar to the exemplar containers in Heading 4202, which also carries an *ad valorem* tax of 20%. *SGI*, 917 F. Supp. at 833.

In classifying the coolers, the Court of International Trade held that the reasoning in *Sports Graphics* did not apply to exclude the coolers from classification under Heading 4202, HTSUS, for several reasons. The Court of International Trade found that Heading 4202 is expressly broader than the TSUS luggage provisions under which *Sports Graphics* was decided. For instance, it included "an expanded and diversified list of exemplar containers, such as shopping bags, holsters, musical in-

struments cases, map cases, toiletry bags, sports bags, tool bags, jewelry boxes, etc." *SGI*, 917 F. Supp. at 827. The Court of International Trade also found that no provision existed under the HTSUS containing the relevant language of item 772.15 (or 772.16), TSUS, *i.e.* articles chiefly used for preparing, serving, or storing food or beverages, found to be the proper classification for the coolers in *Sports Graphics. Id.*

The Court of International Trade applied the reasoning in *Totes, Inc. v. United States*, 69 F.3d 495, 498 (Fed. Cir. 1995), which found that the criterion for being *ejusdem generis* with the *eo nomine* articles set forth under Heading 4202, based on the essential characteristics or purposes that unite the exemplar articles, is whether the merchandise to be classified is designed to "organize, store, protect and carry various items." The Court of International Trade said:

Indeed, the expanded panoply of enumerated containers described in Heading 4202, designed to protect, store, and carry wide-ranging products, and some serving the purpose of storing certain consumable products, including pouches and cases for cigarettes and tobacco, leaves little doubt that storage of food in coolers is not a "different purpose" than that served by the Heading 4202 exemplars.

Thus, for application of *ejusdem generis* to Heading 4202, it is the exemplar containers' purpose or use for storage, transportation, protection, etc. that is relevant, and not whether the contents stored and/or carried by the exemplar containers are food or beverages. Although most of the Heading 4202 exemplar containers are not specifically designed and constructed for storage of food or beverages to maintain a cold temperature over time, precise functional equivalence to, or commercial interchangeability with, particular exemplars enumerated in the Heading is plainly not required by the term "similar" or the rule of *ejusdem generis*.

SGI, 917 F. Supp. at 828 (citation omitted). The Court of International Trade found, based on this reasoning, that the coolers were properly classified under Heading 4202.

The Court of International Trade, however, refused to affirm Customs' classification of the coolers under 4202.92.45, HTSUS, encompassing "Travel, sports and similar bags," saying:

Because the coolers are not "designed for carrying clothing and other personal effects during travel," like backpacks and shopping bags, it does not follow *ipso facto* that the coolers do not possess the essential common characteristics that unite all of the exemplar containers in Heading 4202. As the Court has found that the coolers are *ejusdem generis* with the exemplar containers in Heading 4202, they are classifiable as "similar containers" within the purview of subheading 4202.92.90, HTSUS, a less specific subheading than subheading 4202.92.45.

SGI, 917 F. Supp. at 831.

DISCUSSION

Whether an imported item has been properly classified involves a two step analysis:

- (1) ascertaining the proper meaning of specific terms in the tariff provision; and
- (2) determining whether the merchandise at issue comes within the description of such terms as properly construed.

Sports Graphics, 24 F.3d at 1391. Determining the proper meaning of terms is a question of law that we review de novo, while determining whether the item fits within such meaning is a question of fact that we review for clear error. *Id.*; *Marcel Watch Co. v. United States*, 11 F.3d 1054, 1056 (Fed. Cir. 1993). The parties filed cross-motions for summary judgment and agree that there are no disputed issues of material fact. Therefore, the sole issue is a matter of properly interpreting the pertinent sections of the HTSUS. See *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed. Cir. 1997) ("[N]one of the pertinent characteristics of the merchandise is in dispute, and thus the sole issue is a matter of properly interpreting the classification term at issue—footware—to determine whether the scope of that term is broad enough to encompass the items with the particular characteristics").

SGI asserts that its Chill coolers should be classified under Headings 3923, 3924, or 3926 based on the plastic material composition of the cooler, its use for preserving specific items, food and beverages, and our analysis of the classification of the identical goods under TSUS in *Sports Graphics*. SGI's argument focuses on the items contained in the coolers and the purpose for containing them, *i.e.*, to store and preserve food or beverages and maintain their cold temperature over time.

The United States argues that the Court of International Trade properly classified the coolers under subheading 4202.92.90, HTSUS, because they are *ejusdem generis* with the exemplars of Heading 4202. The United States supports the Court of International Trade's refusal to apply the reasoning in *Sports Graphics* because there are material differences between the comparable provisions of the TSUS and the HTSUS. Heading 4202, HTSUS, is a much broader provision than the luggage provision under TSUS, the United States argues, and the pertinent language of item 772.15 (or 772.16), TSUS, under which we classified the coolers in *Sports Graphics*, was omitted from the HTSUS. By applying our analysis of Heading 4202 in *Totes*, in which we found that the unifying characteristics of the exemplars is whether the merchandise is designed to organize, store, protect and carry various items, the United States argues that the Court of International Trade properly found that the coolers at issue are similar containers because storage and protection are sufficiently broad concepts to embrace preservation accomplished by insulating materials that affect the rate of temperature change.

In *Sports Graphics*, we stated that:

Under the rule of *ejusdem generis*, which means "of the same kind," where an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified. As applicable to classification cases, *ejusdem generis* requires that the imported merchandise possess the essential characteristics or purposes that unite the articles enumerated *eo nomine* in order to be classified under the general terms.

Sports Graphics, 24 F.3d at 1392 (citations omitted).

In *Sports Graphics* we agreed with the trial court that the proper classification of the coolers involved a focus on whether food or beverage is involved. *Id.* at 1393 and 1394. The analysis of Heading 4202, HTSUS, in *Totes* does not vitiate this determination. In *Totes* we stated that the containers listed *eo nomine* in subheading 4202.92.9020 had the essential characteristic of organizing, storing, protecting, and carrying various items. 69 F.3d at 498. In this analysis, we distinguished *Sports Graphics* as follows:

We held [in *Sports Graphics*] that "the merchandise had a different purpose, the storage of food or beverage, which precluded the merchandise from being *ejusdem generis* with the exemplars listed in the luggage provision." Moreover, the specific use for food was predominant over the more general description as luggage. Therefore, we affirmed the trial court's determination that the coolers were classifiable as items for storing food or beverages under item 772.15, TSUS, and were not classifiable as luggage under item 706.62, TSUS.

Totes, 69 F.3d at 498 (quoting *Sports Graphics*, 24 F.3d at 1393).

In applying the rationale of *Sports Graphics* to the identical merchandise at issue in this case, we again must focus on whether food or beverages are involved with the *eo nomine* exemplars set forth in the provisions in the HTSUS at issue. The relevant portion of Heading 4202 found by the Court of International Trade to encompass the coolers is as follows:

4202

Trunks, suitcases, vanity cases, attache cases, brief-cases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of plastic sheeting, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials:

Articles of a kind normally carried in the pocket or in the handbag:

Other:

4202.92	With outer surface of plastic sheeting or of textile materials:
	Travel, sports and similar bags:
	With outer surface of textile materials:
*	*
*	*
*	*
*	*
*	*
	Other:
4202.92.90	Other 20%

As under the comparable luggage provision under TSUS, none of the exemplars under subheading 4202.92.90 involves containment of any food or beverage. The additional exemplars in HTSUS that the Court of International Trade states makes the provision broader than the comparable luggage provision under TSUS also do not include containers that organize, store, protect, or carry food or beverages. An alternative classification under HTSUS presented by SGI, however, does encompass exemplars that are *ejusdem generis* with the coolers because their purpose is to contain food and beverages.

The classification under HTSUS that we hold is the appropriate classification for the coolers is subheading 3924.10.50. Heading 3924 is the successor provision to TSUS item 772.15 (or 772.16). This provision reads as follows:

3924	Tableware, kitchenware, other household articles and toilet articles, of plastics:
3924.10	Tableware and kitchenware:
	Salt, pepper, mustard and ketchup dispensers and similar dispensers
	Plates, cups, saucers, soup bowls, cereal bowls, sugar bowls, creamers, gravy boats, serving dishes and platters
	Trays
3924.10.50	Other 3.4%

The exemplars listed in Heading 3924 encompass various household containers for foodstuffs such as salt, pepper, mustard, and ketchup dispensers and serving pieces for food. The Explanatory Notes accompanying Heading 3924 also offer guidance in interpreting this heading. *Totes*, 69 F.3d at 500; *see also Rollerblade*, 112 F.3d at 486 n.3 (Although these Explanatory Notes are not controlling legislative history, "they are nonetheless intended to clarify the scope of HTSUS subheadings and to offer guidance in interpreting its subheadings.") The explanatory notes specifically mention "luncheon boxes," an article similar to the coolers at issue, as "other household articles."¹ As the Court of International Trade found, the coolers may be considered "household articles" because "[t]he coolers may be used in a number of locations where food or beverages might be consumed, such as in and around the home and during trips away from home on picnics, sporting, and at spectator and participation sporting events." *SGI*, 917 F. Supp. at 825.

¹ None of the alternative classifications offered by SGI specifically contained foodstuffs.

CONCLUSION

We hold that the proper classification for the coolers is subheading 3924.10.50, HTSUS, carrying an ad valorem tax of 3.4%.

REVERSED

BAUERHIN TECHNOLOGIES LTD. PARTNERSHIP AND JOHN V. CARR & SON
INC., PLAINTIFFS-APPELLANTS v. UNITED STATES, DEFENDANT/CROSS-
APPELLANT

Appeal No. 96-1275 and 96-1276

(Decided April 2, 1997)

Jerry P. Wiskin, Simons & Wiskin, of New York, New York, argued for plaintiffs-appellants. With him on the brief was *Philip Yale Simons*.

Mikki Graves Walser, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, International Trade Field Office, of New York, New York, argued for defendant/cross-appellant. With her on the brief were *Frank W. Hunger*, Assistant Attorney General, and *David M. Cohen*, Director, of Washington, D.C., and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office. Of counsel on the brief was *Chi S. Choy*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, of New York, New York.

Appealed from: United States Court of International Trade.
Judge WALLACH.

Before NEWMAN, LOURIE, and RADER, *Circuit Judges.*

LOURIE, Circuit Judge.

Bauerhin Technologies Limited Partnership and John V. Carr & Son Inc. (collectively, Bauerhin) appeal from the summary judgment of the United States Court of International Trade holding that the United States Customs Service correctly classified their imported child seat inserts. *Bauerhin Techs. Ltd. v. United States*, 914 F. Supp. 554 (Ct. Int'l Trade 1995). The United States cross-appeals from the court's holding that Customs incorrectly classified certain canopies as parts of car seats. Because the court did not err in determining the proper classification for either the seat inserts or the canopies, we affirm.

BACKGROUND

Bauerhin imports cushioned inserts and canopies for child seats. The cushioned inserts, described in the commercial invoices as "baby pads" or "upholstery for baby car seats," are specially designed to fit child automobile safety seats, infant carriers, and infant swings. It is undisputed that the inserts are imported in the shape and form of the seats for which they are designed and that they have sewn openings to allow the insertion of a restraining device or safety belts. It is also undisputed that

the inserts are imported separately from the seats with which they are to be used, although when sold to the ultimate consumer they are either packaged together with the seats or sold specifically as replacement parts. Likewise, the canopies are designed to fit over the child automobile safety seats and, although imported separately, are sold as parts of the seats to which they are attached.

The Harmonized Tariff Schedule of the United States (HTSUS) provides in pertinent part as follows:

Chapter 63. Other made up articles; sets; worn clothing and worn textile articles; rags.

6307 Other made up articles, including dress patterns

* * * * *

6307.90 Other:

6307.90.99 Other:

* * * * *

Other

* * * * *

Chapter 94. Furniture; bedding, mattresses, mattress supports, cushions and similar stuffed furnishings ***

9401 Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof:

* * * * *

9401.90 Parts:

9401.90.10 Of seats of a kind used for motor vehicles

* * * * *

9404 Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eider-downs, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered:

* * * * *

9404.90 Other:

Pillows, cushions and similar furnishings:

9404.90.10 Of cotton

9404.90.20 Other

The seat inserts are composed of cotton and polyester with polyester fiberfill. Customs classified them under heading 9404.90.20 as non-cotton cushions under the broader heading of "articles of bedding and similar furnishing," dutiable at the rate of 6% *ad valorem*. Customs classified the imported canopies under heading 6307 as "other made up textile articles," and specifically under subheading 6307.90.94 (now 6307.90.99), dutiable at the rate of 7% *ad valorem*. This subheading is a basket provision, encompassing all "other made up textile articles" that are not enumerated elsewhere under that heading.

Bauerhin appealed to the Court of International Trade, arguing that Customs had misclassified both the inserts and the canopies. In particular, it argued that both items were properly classified under heading 9401 as parts of seats, with duties during the relevant time period no higher than 3.1%. Heading 9401 covers "seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof." Subheading 9401.90.10 specifically covers parts of seats of a kind used for motor vehicles.

Although not persuaded by Bauerhin's arguments concerning the inserts, the Court of International Trade agreed with Bauerhin that the canopies should have been classified as parts of seats and not as "other made up textile articles." The court held that the canopies were properly classifiable as parts of car seats, notwithstanding the fact that they are not necessary to the operation of the car seats to which they are attached. Finding no genuine issues of material fact in dispute, the court held on summary judgment that Customs correctly classified the inserts in heading 9404, but incorrectly classified the canopies. The court held that the canopies are properly classified under subheading 9401.90.10.

DISCUSSION

We review the Court of International Trade's grant of summary judgment "for correctness as a matter of law, deciding *de novo* the proper interpretation of the governing statute and regulations as well as whether genuine issues of material fact exist." *Guess? Inc. v. United States*, 944 F.2d 855, 857 (Fed. Cir. 1991). Determining the proper scope of a classification in the HTSUS is an issue of statutory interpretation and thus a question of law. Determining whether a particular imported item falls within the scope of the various classifications as properly construed is a question of fact. See *Marcel Watch Co. v. United States*, 11 F.3d 1054, 1056 (Fed. Cir. 1993). Because the nature and use of the imported products are not in dispute in this case, the resolution of this appeal turns on the determination of the proper scope of the relevant classifications.

A. *The Seat Inserts:*

Bauerhin argues that heading 9404, "articles of bedding and similar furnishing," is limited to articles that have a primary purpose associated with sleeping or napping. Because sleeping or napping is not the principal use of the car seat inserts, Bauerhin argues that the court erred by classifying the inserts within heading 9404. The government responds that the scope of heading 9404 is broader than the traditional notion of "bedding" and encompasses stuffed articles that render "comfort and protection." Specifically, the government argues that the court properly recognized that the car seat inserts are "cushions" within the meaning of subheading 9404.90.

The General Rules of Interpretation (GRI) for the HTSUS provide that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes," GRI 1, and that "[f]or legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of

those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules," GRI 6. Therefore, we begin our inquiry by examining the descriptions of the relevant headings, subheadings, and accompanying notes. Subheading 9401.90.10 covers "parts: of seats of a kind used for motor vehicles" within heading 9401 which includes "seats * * * whether or not convertible into beds, and parts thereof." It is undisputed that the seat inserts fall within the description of heading 9401.

However, Note 3(b) for Chapter 94 of the HTSUS states: "Goods described in heading 9404, entered separately, are not to be classified in heading 9401, 9402 or 9403 as parts of goods." It is undisputed that the seat inserts are entered separately from the seats with which they are a part. Therefore, if the seat inserts are otherwise classifiable within both headings 9404 and 9401, Note 3(b) expressly excludes them from heading 9401. Thus, even though a fact finder might conclude that heading 9401 would ordinarily be the better classification for the imported seat inserts, heading 9404, if applicable, must prevail.

Had the heading and subheading descriptions of 9404 been limited solely to "articles of bedding and similar furnishing," Bauerhin's argument that seat cushions are not similar to bedding might have been more persuasive. However, given that "cushions" are specifically enumerated in the subheadings of 9404, Note 3(b) must control over heading 9401 as long as the term "cushions" is construed in accordance with its common and popular meaning. This must occur unless evidence of legislative intent indicates that the term was intended to exclude cushions designed to be used with seats. See *E.M. Chems. v. United States*, 920 F.2d 910 (Fed. Cir. 1990) ("[T]ariff terms are to be construed in accordance with their common and popular meaning, in the absence of a contrary legislative intent."). No such legislative intent exists; in fact, the contrary appears to be true.

Bauerhin argues that the inserts cannot be classified under heading 9404 because they are not associated with beds, but are parts of seats. The government readily concedes that the inserts are parts of seats. However, the government contends that they are also undoubtedly cushions. Bauerhin responds that the term "cushions" must be interpreted in light of the heading description and that under the doctrine of *ejusdem generis*, the seat inserts cannot genuinely be considered "similar furnishing" to "bedding." *Ejusdem generis* is a well-settled rule of statutory construction which provides that

where an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified. * * * As applicable to classification cases, *ejusdem generis* requires that the imported merchandise possess the essential characteristics or purposes that unite the articles enumerated *eo nomine* in order to be classified under the general terms.

Sports Graphics, Inc. v. United States, 24 F.3d 1390, 1392 (Fed. Cir. 1994). Bauerhin argues that the imported seat inserts do not possess the essential characteristics of "bedding." Bauerhin contends that bedding must necessarily be limited to "materials for a bed." Bauerhin supports its interpretation by referring to the definition of "bedding" in the predecessor statute, the Tariff Schedules of the United States. In that statute, "bedding" was defined as "sheets, pillowcases, blankets, bedspreads, coverlets, quilts, comforters, and other articles, by whatever name known, chiefly used as a bed furnishings, including mattress pads and covers, and spring pads and covers, all the foregoing of textile materials, but not including pillows, cushions, and mattresses." Tariff Schedules of the United States, Schedule 3, Part 5, Note 1. Bauerhin argues that the same definition applies to the term "bedding" in the HTSUS. We disagree.

The cited definition, which was not incorporated into the HTSUS, differs decisively from the articles enumerated in the description of heading 9404. That former definition expressly excludes "cushions," which are specifically enumerated under heading 9404. Moreover, heading 9404 refers to articles "fitted with springs or stuffed or internally fitted with any material." Heading 9404 does not include any nonstuffed articles typically associated with bedding such as sheets, pillowcases, blankets, bedspreads, mattress pads, and covers. With the addition of "cushions" and "pouffes," the dominant characteristic of the articles in 9404 is that they are all stuffed. Therefore, the legislative change in the schedule supports the conclusion that the term "cushions" in heading 9404 must be interpreted according to its ordinary meaning and thus includes seat cushions.

Furthermore, the Explanatory Notes for Chapter 94 of the HTSUS, published in 1988 by the Customs Cooperation Council, support this interpretation. Although not carrying the force of law or the weight of legislative history, the Explanatory Notes were produced contemporaneously with the tariff schedule and thus offer guidance in interpreting the subheadings. The Explanatory Notes state:

Separately presented cushions and mattresses * * * are *excluded (94.04)* even if they are clearly specialised [sic] as parts of upholstered seats (e.g., settees, couches, sofas). When these articles are combined with other parts of seats, however, they remain classified in this heading. They also remain in this heading when presented with the seats of which they form part.

Thus, our conclusion that Note 3(b) excludes separately presented seat cushions from heading 9401 is consistent with the Explanatory Notes. Whether or not the car seats are used primarily for "napping" is irrelevant. Accordingly, the Court of International Trade did not err by affirming Customs' classification of the inserts under heading 9404.

B. The Canopies:

The United States argues on cross-appeal that the Court of International Trade erred by reclassifying the imported canopies under heading

9401.90.10 as parts of seats. According to the United States, the canopies are properly classified in the basket provision under heading 6307 as "other made up textile articles." Customs' rationale is that the canopies are not "parts" as that term is used in the tariff schedule.

Rule 1(c) of the Additional U.S. Rules of Interpretation states that "a provision for parts of an article covers products solely or principally used as a part of such articles but a provision for 'parts' or 'parts and accessories' shall not prevail over a specific provision for such part or accessory." Thus, if the canopies are properly considered "parts" and there is no specific provision for canopies in the HTSUS, then they are properly classified in heading 9401. However, the government contends that the canopies are not properly considered "parts" because of the rule established in *United States v. Willoughby Camera Stores, Inc.*, 21 CCPA 322 (1933).

In *Willoughby Camera*, our predecessor court held that a tripod was not properly classified as a part of a camera. The court noted that "[t]he mere fact that two articles are designed and constructed to be used together, does not necessarily make either a part of the other" and also stated in an oft-quoted passage that a part "is an integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article." *Id.* at 324. The government argues that in light of the *Willoughby Camera* decision, there is a two-pronged test for determining whether an imported item is properly classified as a part: the item must be integral or directly related to the function of the article with which it is joined and the item must be solely or principally used with the article with which it is joined. Thus, the government argues, because the canopies are not integral or directly related to the restraint function of the car seats to which they are attached, they cannot be parts of the car seats. We disagree.

Willoughby Camera is one of several cases which discuss how to differentiate parts from other articles under the particular facts presented in each case. *Willoughby Camera* dealt with an imported tripod that was not solely used with cameras, but was "used for various other purposes." *Id.* at 324. The imported tripod "perform[ed] its separate function without loss of any of its essential characteristics" when used independently of the camera. It was a "distinct and separate commercial entity" from the camera. *Id.* at 325. The court held that the tripod was not a "part."

That case does not control the result here. The facts in *Willoughby Camera* are considerably different from those presented here in which the article at issue, the canopy, serves no function or purpose that is independent of the child safety seat. It is undisputedly designed, marketed, and sold to be attached to the child safety seats. The facts of this case bear a closer resemblance to *United States v. Pompeo*, 43 CCPA 9 (1955). In *Pompeo*, the issue was whether an imported supercharger was properly considered a part of an automobile. There, the court looked to the nature and function of the *imported item*, the supercharger, to determine whether the item was a part of an automobile. The government in

that case argued that because the automobiles were able to function with or without the supercharger, the imported supercharger was not properly considered a part of the automobile. The court disagreed, noting that the classification of the supercharger should turn on the nature of the supercharger and not on the design choices of the automobile manufacturer. Because the imported supercharger was "dedicated irrevocably for use upon automobiles," the court held that the supercharger was properly classified as a part of automobiles. *Pompeo*, 43 CCPA at 13.

The parties seem to take different positions regarding whether *Willoughby Camera* or *Pompeo* is the controlling precedent for determining whether an imported item is or is not a "part" within the meaning of the tariff schedules. We conclude that these cases are not inconsistent and must be read together. As set forth in *Willoughby Camera*, an "integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article" is surely a part for classification purposes. 21 CCPA at 324. However, that test is not exclusive. *Willoughby Camera* does not address the situation where an imported item is dedicated solely for use with an article. *Pompeo* addresses that scenario and states that such an item can also be classified as a part.

Reconciling *Willoughby Camera* with *Pompeo*, we conclude that where, as here, an imported item is dedicated solely for use with another article and is not a separate and distinct commercial entity, *Pompeo* is closer precedent and *Willoughby Camera* thus does not apply. See *Galagher & Ascher Co. v. United States*, 52 CCPA 11, 15-16 (1964) (noting that *Trans Atlantic Co. v. United States*, 48 CCPA 30 (1960), expressly limited the rule in *Willoughby* "to fact situations of the precise type which the court there had before it"). Under *Pompeo*, an imported item dedicated solely for use with another article is a "part" of that article within the meaning of the HTSUS. The canopies in this case are dedicated solely for use with the child safety seats. They are neither designed nor sold to be used independently. Therefore, the canopies are properly considered parts under the HTSUS.

In this case, there is no specific provision that covers the canopies. Rather, Customs argues that the canopies should be classified under a basket provision. Under Rule 1(c) of the Additional Rules of Interpretation, quoted above, a provision for a part must prevail over a mere basket provision. Accordingly, we hold that the Court of International Trade did not err by classifying the canopies under heading 9401 as parts of car seats.

CONCLUSION

The Court of International Trade did not err in determining that the seat inserts were properly classified as cushions within heading 9404. Furthermore, the court did not err in determining that the canopies were properly classified under heading 9401 as parts of seats.

AFFIRMED

MARUBENI AMERICA CORP, PLAINTIFF-APPELLANT v.
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 96-1310

(Decided May 20, 1997)

Richard C. King, Fitch, King & Caffentzis, of New York, New York, argued for plaintiff-appellant. Of counsel was *James Caffentzis*.

James A. Curley, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Frank W. Hunger*, Assistant Attorney General, *David M. Cohen*, Director, of Washington, D.C., and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, of New York, New York.

Appealed from: United States Court of International Trade.
Senior Judge NEWMAN.

Before *MAYER, SCHALL*, and *BRYSON*, *Circuit Judges.*

MAYER, Circuit Judge.

For tariff purposes, what is a hollow, cylindrical, copper product with helical ridges and grooves internally spiraling its length? Is it a "profile" or a "tube or pipe"? Marubeni America Corporation, which imported such a product, appeals the United States Court of International Trade's summary judgment, *Marubeni Am. Corp. v. United States*, 905 F. Supp. 1101 (1995), interpreting Note 1(h) of chapter 74 of the Harmonized Tariff Schedule of the United States and classifying the import as a "profile." We reverse and remand.

BACKGROUND

Subheadings 7411.10.10 and 7407.10.10 of the Harmonized Tariff Schedule of the United States (1990)* (Harmonized Schedule) respectively imposed a 1.5% duty on refined copper "tubes and pipes" and a 6.3% duty on refined copper "profiles." In part, Note 1(h) of chapter 74 of the Harmonized Schedule defined tubes and pipes to have "uniform wall thickness" or to be "threaded." Note 1(e) residually defined profiles as " * * * products * * * which do not conform to * * * the definitions of * * * tubes or pipes," among others.

In 1989 and 1990, Marubeni imported a cylindrical, hollow, seamless refined copper product with uniform, circular cross sections and helical ridges and grooves internally spiraling its length. Physically, the product's grooves and ridges rendered its wall thickness non-uniform. Thermodynamically, the grooves and ridges facilitated heat transfer when the product was transformed into air conditioner coils, which carry refrigerants, such as freon. This common application did not use the product's grooves and ridges for attachment or fastening.

The United States Customs Service interpreted "threaded" in Note 1(h) to require not only a physical structure but also a particular function: only products with grooves and ridges used to attach or fasten

* The relevant portions of the 1989 and 1990 versions of the Harmonized Schedule were identical.

could be "threaded," it asserted. Accordingly, Marubeni's product was not "threaded." Because the import also lacked uniform wall thickness, Customs deemed it a profile and assessed a 6.3% duty upon each shipment. Marubeni paid the assessments and timely filed corresponding administrative protests, which Customs denied. Consequently, the importer commenced this action in the Court of International Trade pursuant to 28 U.S.C. § 1581(a). Seeking the difference between the duty it paid and the duty it would have paid under subheading 7411.10.10, Marubeni argued that its product was a "threaded" tube. Holding that the common meaning of "threaded" connotes functional as well as physical characteristics, the court entered judgment for the United States and subsequently denied Marubeni's motion for rehearing, see 915 F. Supp. 413 (1996). Marubeni appeals.

DISCUSSION

Whether Marubeni's import's helical grooves and ridges made it "threaded" necessarily depends upon the word's meaning in Note 1(h) of chapter 74 of the Harmonized Schedule, which we interpret *de novo*. See *Guess? Inc. v. United States*, 944 F.2d 855, 857 (Fed. Cir. 1991). Note 1(h) defines tubes and pipes as:

Hollow products, coiled or not, which have a uniform cross section with only one enclosed void along their whole length in the shape of circles, ovals, rectangles (including squares), equilateral triangles or regular convex polygons, and which have a uniform wall thickness. Products with a rectangular (including square), equilateral triangular or regular convex polygonal cross section, which may have corners rounded along their whole length, are also to be taken to be tubes and pipes provided the inner and outer cross sections are concentric and have the same form and orientation. *Tubes and pipes* of the foregoing cross sections *may be* polished, coated, bent, *threaded*, drilled, waisted, expanded, cone-shaped or fitted with flanges, collars or rings.

(Emphasis added.)

The government argues that "[t]he trial court's interpretation of 'threaded' to include both structure and function comports with the common meaning of that term." In particular, the government cites three "reliable sources of lexicographic information" to support its contention. The first source, 18 *McGraw-Hill Encyclopedia of Science and Technology* 329 (6th ed. 1987), defines threading as:

The forming of a ridge and valley of uniform cross section which spiral about the inner or outer diameter of a cylinder or cone in an even and continuing manner. The work must be produced with sufficient uniformity and accuracy so that the resulting threaded part will accomplish its intended purpose of fastening, transmitting motion or power, or measuring.

Under the heading "Screw Threads," the second reference indicates that "[t]he principal use of threads are (1) for fastening, (2) for adjusting, and (3) for transmitting power." W. J. Luzzader, *Fundamentals of*

Engineering Drawing 315 (9th ed. 1985). And, also under the heading "Screw Threads," *Encyclopedia Britannica*, vol. 20, p. 92 (14th ed. 1973) reads, in part:

A thread on the outside of a cylinder is an external or male thread; cut on the inside of a hole, as in a nut, it is an internal or female thread. The purpose in using threaded members may be: (1) to join two or more parts together; (2) to transmit power or force; (3) to obtain a mechanical advantage, that is, a large force from a small one; or (4) to transmit motion either rotary to linear or linear to rotary.

The government cautions, moreover, that "[i]f function is to be thrown to the winds * * * the meaning of 'threaded' can be burlesqued to the point where it can be said that the spiral grooves of a phonograph record cause that article to be threaded."

Notwithstanding the government's admonition, Note 1(h) allows more than cylindrical "threaded" tubes and pipes. By definition, a product with triangular or rectangular, cross sections may be threaded. Not one of the government's sources contemplates, let alone defines, such threading. The *McGraw Hill Encyclopedia of Science and Technology*, which presupposes but does not necessitate an "intended purpose" for threading, solely refers to threading cylinders and cones. *Fundamentals of Engineering Drawing* and *Encyclopedia Britannica* list possible purposes of screw threads but regard only conical or cylindrical screws. Moreover, the government provides no examples of triangular or rectangular tubes or pipes with threads that fasten parts, transmit force, enhance power, or transmit motion.

The government's question-begging definition is untenable. It takes the narrow definition for "screw threads" and inductively applies its functional requirements to products with shapes that almost certainly preclude functioning as screws. Left without a definition or example of a screw with a triangular or rectangular body, we surmise that such products suffered the fate of the square wheel. "Threaded" in Note 1(h) refers only to physical form and aptly described Marubeni's product.

CONCLUSION

Accordingly, we reverse the judgment of the Court of International Trade and remand the case for further proceedings consistent with this opinion.

COSTS

Marubeni shall have its costs.

REVERSED AND REMANDED

BETTER HOME PLASTICS CORP. PLAINTIFF-APPELLEE *v.*
UNITED STATES, DEFENDANT-APPELLANT

Appeal No. 96-1322

(Decided July 16, 1997)

Peter J. Fitch, Fitch, King and Caffentzis, of Monmouth Beach, NJ, argued for plaintiff-appellee. Of counsel was *James Caffentzis*.

Saul Davis, Attorney, Civil Division, Department of Justice, International Trade Field Office, of New York, New York, argued for defendant-appellant. With him on the brief were *Frank W. Hunger*, Assistant Attorney General, *David M. Cohen*, Director, of Washington, D.C., and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office. Of counsel on the brief was *Karen P. Binder*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, of New York, New York.

Appealed from: United States Court of International Trade.
Senior Judge DiCarlo.

Before *RICH*, *CLEVENGER*, and *BRYSON*, *Circuit Judges*.

RICH, *Circuit Judge*.

This appeal is from a decision entered 9 February 1996 by the United States Court of International Trade on a stipulation of agreed facts in a Customs classification case, No. 93-01-00065, involving inexpensive imported shower curtain sets. The court ordered Customs to set aside its classification of the sets and reclassify the sets as requested by the plaintiff. We affirm.

BACKGROUND

The shower curtain sets in question comprise an outer textile curtain, an inner plastic magnetic liner, and plastic hooks. The outer textile curtain typically has a decorative pattern, and being semi-transparent, it permits the color of the plastic liner to show through. The inner plastic liner prevents water from escaping the shower and prevents the fabric curtain from being soiled with mildew or soap. The liner is opaque, and thereby also contributes to the decorative and privacy-maintaining functions of the set. The hooks attach the liner and the curtain to the overhead curtain rod found at the entrance to most domestic showers. The sets are at the low end of the shower curtain market: plaintiff, Better Home Plastics, sells the sets to discount stores for \$5-\$6 per set; they are resold to consumers for \$9-\$12 per set.

The General Rules of Interpretation (GRI) of the Harmonized Tariff Schedule of the United States (HTSUS) help determine which subheading should govern the duty to be assessed on imports of these sets. According to GRI 3(a), when "goods are, *prima facie*, classifiable under two or more headings," the court must choose the heading providing the most specific description. This is the so-called relative specificity test. GRI 3(a) provides an exception to the applicability of this test, however, when "two or more headings each refer * * * to only part of the items in a set." Pursuant to GRI 3(b), goods not classifiable under GRI 3(a) are classified by the "component which gives them their essential charac-

ter." This is the so-called essential character test. GRI 3(c) provides a default rule for goods not classifiable after resort to either GRI 3(a) or (b). GRI 3(c) directs that such goods be classified "under the heading which occurs last in numerical order among those which equally merit consideration."

Two subheadings of the HTSUS are in issue. The sets might be classified on the basis of the textile curtain, pursuant to subheading 6303.92.000 of the HTSUS, resulting in a duty of 12.8%. Alternatively, they might be classified on the basis of the plastic liner, pursuant to subheading 3924.90.1010 of the HTSUS, resulting in a duty of 3.36%. Customs classified the sets under subheading 6303.92.000 because Customs applied the default rule of GRI 3(c) after determining that neither the relative specificity test nor the essential character test was applicable.

Plaintiff brought suit before the Court of International Trade contending that the sets should be classified under the other subheading. Beginning with the relative specificity test, the court concluded that the test was inapplicable because the two competing headings each refer only to part of the items in the set. The court then concluded that the essential character test was applicable and that under the test the essential character of the sets is derived from the plastic liner.

ANALYSIS

On appeal, there is extensive argument about presumptions and deference that can be quickly addressed. The United States argues that Customs' determinations are entitled to a statutory presumption of correctness under 28 U.S.C. § 2693(a)(1) (1994) and that the Court of International Trade did not give proper administrative deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), to Customs' classification, after its decision that the essential character cannot be determined. As we have recently held in several cases, neither argument is of merit here, where the sole issue is the proper classification of a particular imported good. See *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed. Cir. 1997); *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491-93 (Fed. Cir. 1997); *Goodman Mfg. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995). The procedure and standards for review of Customs' classifications is clear. Acknowledging the procedural importance of presumptions, the Court of International Trade is nonetheless charged with the duty to "reach the correct decision." *Rollerblade*, 112 F.3d at 484 (quoting 28 U.S.C. § 2643 (b)). On appeal, we review the findings of that court—not those of Customs—for clear error; while we decide questions of law *de novo*. *Universal Elecs.*, 112 F.3d at 491.

We turn, then, to the merits of the arguments presented. The United States argues that the Court of International Trade erred in its application of the essential character test because, according to the United States, the fabric curtain provides the essential character of the sets. In the alternative, the United States argues that the essential character

cannot be determined and the default rule of GRI 3(c) should apply. We disagree with both arguments.

The Court of International Trade carefully considered all of the facts, and, after a reasoned balancing of all the facts, concluded that Better Home Plastics offered sufficient evidence and argument to overcome the presumption of correctness. The court concluded that the indispensable function of keeping water inside the shower along with the protective, privacy and decorative functions of the plastic liner, and the relatively low cost of the sets *all combined* to support the decision that the plastic liner provided the essential character of the sets. Contrary to the argument offered by the United States, we are not persuaded that the court erred in looking to analogous areas of law concerning "indispensability" for guidance in analyzing "essential character." The court's decision did not rely solely, or even hinge, on the indispensability of the water-retaining function. The decision was substantially based on the importance of the other functions as well as the cost of the entire set. Therefore, we see no error in the court's ultimate conclusion of essential character in this case. As a result, we also see no error in this case in the court's refusal to reject the essential character test in favor of the default rule of GRI 3(c).

CONCLUSION

In light of the foregoing, we affirm the decision of the Court of International Trade.

AFFIRMED

UNIVERSAL ELECTRONICS INC., PLAINTIFF-APPELLANT *v.*
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 96-1345

(Decided April 24, 1997)

Timothy B. Dyk, Jones, Day, Reavis & Pogue, of Washington, D.C., argued for plaintiff-appellant. With him on the brief was *Sharon K. Mollman*.

Saul Davis, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, Department of Justice, International Trade Field Office, of New York, New York, argued for defendant-appellee. With him on the brief was *Joseph I. Liebman*, Attorney in Charge. Also with him on the brief were *Frank W. Hunger*, Assistant Attorney General, and *David M. Cohen*, Director, Department of Justice, of Washington, D.C. Of counsel on the brief was *Sheryl A. French*, International Trade Field Office, of New York, New York.

Appealed from: United States Court of International Trade.
Judge GOLDBERG.

Before LOURIE, CLEVENGER, and RADER, *Circuit Judges*.
CLEVENGER, *Circuit Judge*.

This classification dispute asks whether the hand-held remote-control units imported by Universal Electronics, Inc. (Universal) were

properly classified under the 1993 version of the Harmonized Tariff Schedule of the United States (HTSUS). The United States Customs Service (Customs) determined, and the Court of International Trade agreed, that the subject imports should be classified under subheading 8537.10.00, HTSUS, which includes bases for electric control. We affirm.

I

Universal imports hand-held remote-control units that are used to control televisions, stereos, and other home appliances equipped with an infrared receiver. These units contain a microprocessor, infrared light-emitting diodes (LEDs), and a software database that includes the infrared command codes for various brands and types of home appliances.

After purchase of the remote control, the consumer configures it to govern a specific home appliance by entering a code corresponding to the appliance's brand and type. When the consumer later presses a key on the remote control, *e.g.*, "volume up," the microprocessor is electrically activated to search the software database for the appropriate command code sequence. Once this command code sequence is located, electricity provided by a battery in the unit drives the LEDs to emit infrared light pulses in the requisite pattern.

When the target appliance receives these infrared pulses, it typically translates the pulses into an electrical signal and electrically conveys that signal to its microprocessor. Using electricity, the microprocessor decodes this signal, and, if the code is recognized as a proper one, the microprocessor employs electricity to perform the requested function, *e.g.*, increasing the volume level.

Before enactment of the HTSUS, Customs ordinarily classified remote controls as television apparatus under item 685.19 of the Tariff Schedules of the United States (TSUS). In so doing, Customs expressly declined to classify the remote controls under heading 685.90 of the TSUS because the imports were not "control panels."¹

After the HTSUS was enacted, Customs began classifying the subject imports under subheading 8537.10.00 (HTSUS), which was the successor to Item 685.90 of the TSUS. Customs did so because 8537.10.00 was broadened to include not only control panels, but also "[b]oards, panels * * * and other bases * * * for electric control or the distribution of electricity."

Universal appealed Customs' classification decision to the Court of International Trade arguing, primarily, that the subject imports are not devices "for electric control." Universal argued that the subject imports should instead be classified as either: (i) "[e]lectrical machines and apparatus, having individual functions, not specified or included else-

¹TSUS Item 685.90 includes:

Electrical switches, relays, fuses, lightning arresters, plugs, receptacles, lamp sockets, terminals, terminal strips, junction boxes and other electrical apparatus for making or breaking electrical circuits, for the protection of electrical circuits, or for making connections to or in electrical circuits; switchboards (except telephone switchboards) and control panels; all the foregoing and parts thereof.

where in this chapter" under subheading 8543.80.90 of the HTSUS, or (ii) "[e]lectric sound or visual signaling apparatus" under subheading 8531.80.00 of the HTSUS.

The Court of International Trade determined that:

HTSUS subheading 8537.10.00 refers to a very broad range of items. The subheading covers, among other things, foundations, which may be flat, upon which two or more electrical devices listed in heading 8536, such as switches and terminals * * * are mounted. In addition, these foundations * * * must be a part of a system in which information is input, and as a consequence, electricity causes the desired result to occur.

The court then applied this interpretation to the subject imports and determined that they fell within the subheading. The court also considered, but rejected, Universal's argument that the subject imports were better described by the other classification provisions.

Universal appeals from the decision of the Court of International Trade, which we review pursuant to 28 U.S.C. § 1295(a)(5) (1994).

II

As we have often explained, a classification decision, ultimately, is a question of law based on two underlying steps. The first step concerns the proper meaning of the tariff provisions at hand; this is a question of law, which we review *de novo*. *Intel Singapore, Ltd. v. United States*, 83 F.3d 1416, 1417-18 (Fed. Cir. 1996). The second step concerns whether the subject imports properly fall within the scope of the possible headings; this is a question of fact, which we review for clear error. *Id.*

By statute, Customs' classification decision "is presumed to be correct." 28 U.S.C. § 2639(a)(1) (1994). Universal argues, however, that the presumption of correctness applies only when a factual dispute exists. In situations where only a legal dispute exists, Universal argues, the presumption does not apply. In support, Universal cites to our precedent, *Goodman Manufacturing, L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995), which states: "Because there was no factual dispute between the parties, the presumption of correctness is not relevant."

Customs responds that long-standing precedent of this court and its predecessor court makes clear that the statutory presumption of correctness applies to the ultimate classification "decision," and not merely to the underlying factual issue. *See, e.g., Marubeni Am. Corp. v. United States*, 35 F.3d 530, 536 (Fed. Cir. 1994); *United States v. New York Merchandise Co.*, 435 F.2d 1315, 1318 (CCPA 1970). Therefore, Customs argues, the presumption of correctness is always at play.

Customs is correct in noting that our precedent has long and continuously stated that the decision of Customs is presumed to be correct. Before our decision in *Goodman*, however, our precedent had not clarified the aspects of Customs' decision to which the presumption applied.

The presumption of correctness is a procedural device that is designed to allocate, between the two litigants to a lawsuit, the burden of produc-

ing evidence in sufficient quantity.² Specifically, the importer must produce evidence (the burden of production portion of the burden of proof) that demonstrates by a preponderance (the burden of persuasion portion of the burden of proof) that Customs' classification decision is incorrect. The presumption of correctness certainly carries force on any factual components of a classification decision, such as whether the subject imports fall within the scope of the tariff provision, because *facts* must be proven via *evidence*.

The situation is quite different, however, with respect to pure questions of law, such as the proper interpretation of a particular tariff provision or term. Questions of law such as these lie within the domain of the courts, for "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). In such a context, the importer has no duty to produce evidence as to what the law means because evidence is irrelevant to that legal inquiry.³ Therefore, we conclude that although the presumption of correctness applies to the ultimate classification decision, Universal properly interprets *Goodman* as standing for the proposition that, as a practical matter, the presumption carries no force as to questions of law.⁴

It appears that as to questions of law, Customs seeks to apply the presumption of correctness not as a procedural device governing evidence, but rather as a means of affording deference to Customs' interpretation of the law. As we explained in *Goodman*, however, much of the confusion in this area of the law arises from commingling the notion of a presumption of correctness with the notion of deference—two notions that are designed to serve separate functions. See *Goodman*, 69 F.3d at 508.

Unlike the burden of production and burden of persuasion, each of which allocates roles between the two parties to a litigation, deference is a legal concept that allocates roles between one adjudicating tribunal

² Strictly speaking, the presumption of correctness appears to be an "assumption" rather than a true presumption. Whereas presumptions are employed to allocate the burden of production, assumptions are employed to allocate the burden of proof, which includes both the burden of production and the burden of persuasion. That the "presumption" of correctness is in reality an assumption is made plain by the fact that the statutory provision from which it arises is entitled "*Burden of proof; evidence of value*," and by the fact that it does not depend on the establishment of any basic fact. See 28 U.S.C. § 2639 (emphasis added); 21 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* §§ 5122, 5124 (1977).

³ See, e.g., *MGPC, Inc. v. Canadian Hidrogas Resources, Ltd.*, 725 F.2d 1376, 1378 (Temp. Emer. Ct. App. 1983) (agreeing that "the district court should not have decided the case based upon which party had the burden of proof, because interpretation of the regulations in order to determine the maximum lawful price is a question of law, which the trial court had a duty to decide"); *Abeko Indus., Inc. v. Commissioner*, 482 F.2d 150, 156 (3d Cir. 1973) ("Strictly speaking, it may not be proper to refer to 'burden of proof' in reference to the resolution of a question of law."). Indeed, the Court of International Trade has been mandated the duty of reaching the correct result. See 28 U.S.C. § 2643(b) (1994).

Moreover, placing upon the importer the burden of proving the meaning of a tariff provision or term would undermine the desire for uniform and consistent interpretation of the customs law, which is central to customs policy. See *Jarvis Clark Co. v. United States*, 733 F.2d 873, 876 (Fed. Cir. 1984). Under such an approach, the meaning of tariff terms could depend on the quality of the importer's advocacy and could shift from case to case based on the showing made by the particular importer. See *Verosol USA, Inc. v. United States*, 941 F.Supp. 139, 141 n.5 (Ct. Int'l Trade 1996). The uniformity in this field is better promoted by requiring both this court and the Court of International Trade to determine the correct meaning of a tariff provision so that all future importers will know what the tariff provision means. See *Jarvis Clark*, 733 F.2d at 876.

⁴ This interpretation by no means vitiates the role of the presumption. First, we note that in any classification dispute, a significant question of fact is whether the subject imports fall within the scope of the properly construed tariff provision. Second, to say that evidence is irrelevant to a pure question of law is not to say that the importer plays no role in the issue. Although the importer has no duty on the issue, as a practical matter, the importer typically seeks to persuade the court, via argument, that the correct legal interpretation is that which is most favorable to the importer.

and another. For example, because an agency or a trial court may be better suited to make factual findings, a reviewing tribunal may sustain those factual findings unless they are clearly erroneous, unsupported by substantial evidence, or the like. Alternatively, reviewing tribunals generally decide questions of law *de novo* because they are equally well suited to make such decisions. Notions of deference are governed by standards of review and should not be confused with presumptions and other like procedural devices.

When viewed from the perspective of standards of review, it becomes evident that in classification disputes neither this court nor the Court of International Trade defers to Customs' decisions, whether factual or legal. The Court of International Trade does not defer to Customs' decisions because it has been tasked by Congress to conduct a *de novo* review, and to determine the correct classification based on the record made before it.⁵ See 28 U.S.C. §§ 2640(a), 2643(b). On appeal, we review the Court of International Trade's factual findings—not those of Customs, unless they coincide—for clear error. See *Intel*, 83 F.3d at 1418. On questions of law, we defer to neither Customs' nor the Court of International Trade's interpretations; we decide such questions afresh.

To summarize, we agree with Customs that the presumption of correctness applies to the ultimate classification decision. Because the presumption relates to the presentation of evidence, however, as a practical matter, it has force only as to factual components of that decision (*i.e.*, components where evidence is required). Finally, the presumption of correctness, being a procedural device allocating the roles between the two litigating parties, is analytically distinct from the deference afforded to Customs' decision, which is instead governed by standards of review.

III

Having addressed the parties' contentions regarding the role of the presumption of correctness, we next turn to the merits of this particular case. The tariff provision at issue, HTSUS subheading 8537.10.00, provides for:

Boards, panels (including numerical control panels), consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading 8535 or 8536 [such as switches, relays, and plugs], for electric control or the distribution of electricity, including those incorporating instruments or apparatus of chapter 90, other than switching apparatus of heading 8517: For a voltage not exceeding 1,000 V.

(emphasis added).

Universal contends that the Court of International Trade misconstrued the scope of this tariff provision. As explained above, construing

⁵ Moreover, as we recently explained in *Iko*, in the context of a classification dispute, neither this court nor the Court of International Trade defers to Customs' interpretation of a tariff heading on the basis of special deference pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Iko Indus., Ltd. v. United States*, 105 F.3d 624, 626 (Fed. Cir. 1997); see also *Anval Nyby Powder AB v. United States*, 927 F. Supp. 463, 468-69 (Ct. Int'l Trade 1996).

this provision is a question of law, which we perform without deference to either Customs or the Court of International Trade, and which, theoretically, we determine without reference to the subject imports. In doing so, the terms within this provision should be construed in accordance with their common and popular meaning. *Marubeni Am.*, 35 F.3d at 534.

A

Universal's lead argument is that the subject imports are not "for electric control." The dictionary definition of the noun "control" is "[t]he fact of controlling, or of checking and directing action; the function or power of directing and regulating; domination, command, sway." II Oxford English Dictionary 927 (1970). The Court of International Trade construed this term, within the context of the tariff provision, as meaning the process of producing a desired result from a given input. The dictionary definition of the adjective "electric" is "[o]f the nature of, or pertaining to, electricity; producing, caused by, or operating by means of, electricity." III Oxford English Dictionary 76-77. Universal does not contest either the dictionary definition or the Court of International Trade's interpretation of the terms "control" or "electric," separately.

Universal challenges instead the Court of International Trade's combination of these two terms. The court determined that "for electric control" means that "information is input, and as a consequence, electricity causes the desired result to occur." The court's opinion makes clear that the "electricity" to which it refers is the electric current that ultimately causes the desired result, and not to intermediate signals.⁶ Thus, the court interpreted "for electric control" as being a very broad clause that merely requires that the result desired (*e.g.*, an increase in volume) be caused via electricity.

Universal contends that "for electric control" should be construed to mean "the process of producing desired results from a given input *by means of electricity*." In other words, the subject imports must *directly* generate an electric current that causes the desired result; it is not enough that the subject imports (via some non-electric means) cause the appliance to generate the electric current that causes the desired result.

We agree with the interpretation accorded to the phrase "for electric control" by the Court of International Trade, which comports with the ordinary, dictionary definitions of the terms. The tariff provision does not explicitly require the electric control to be direct. Absent such a statement, we see no reason to incorporate any specific limitations as to which device (the subject imports or the appliance controlled) need

⁶ For example, the court explained that a control panel located on the front of a television would fall within this provision because when the user presses the "channel up" button, the panel sends a control signal to the microprocessor, which in turn sends "the necessary amount of electricity to the part of the appliance that makes the desired result occur." (emphasis added). Similarly, the court explained that control boards that employ microwave signals would be devices "for electric control" because the "microwave signals command the microcontrollers to send the electricity necessary to make the desired results occur." In the court's view, the disputed clause requires that the ultimate result (*e.g.*, increasing the volume) be caused by electricity and that some device should control that result.

create the electric current that produces the desired result. The requisite electric control, therefore, may be direct or indirect.

The next step, whether the subject imports fall within the aforementioned definition, is a question of fact, which we review for clear error. The Court of International Trade determined that "the subject remote controls are 'for electric control' because they serve as part of a control system: users input information into the remote controls, and as a consequence, electricity causes the desired result to occur." In other words, the subject imports are "for electric control" because the infrared signal emitted by the subject imports controls the flow of electricity within the target appliance. Indeed, the control of electricity in the target appliances is the sole purpose of the subject imports.

Moreover, we note that the subject imports themselves employ electric control. When the consumer presses a key on the remote control, switches are triggered that send an electric signal to the microprocessor within the remote control. After decoding this signal, the microprocessor sends another electric signal to the infrared transmitter. Thus, electricity is employed throughout the subject imports to achieve the desired output signal.

Throughout the entire system, from user input to desired action, the only non-electric signal is that of the infrared beam. As a result, we discern no clear error in the Court of International Trade's factual determination that the subject imports are employed "for electric control."

B

In the alternative, Universal contends that even if the subject imports are "for electric control," they do not fall within HTSUS subheading 8537.10.00 because they are not "[b]oards, panels (including numerical control panels), consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading 8535 or 8536 [such as switches, relays, and plugs]." The Court of International Trade interpreted this portion of the tariff provision as follows: "the phrase 'panels * * * and other bases,' as used in subheading 8537.10.00, refers to foundations, which may be flat, upon which electrical devices rest." This interpretation, with which we agree, is simply based on the common meanings of the terms and is virtually identical to Universal's proffered interpretation.

The next step involves determining whether the subject imports are boards, panels, or bases. In other words, are they foundations, which may be flat, upon which electrical devices rest? Universal seizes upon the court's statement that the subject imports "*contain several flat panels*" and "*many buttons that are switches are mounted on these panels.*" (emphasis added). From this statement, Universal mounts its argument that it is not enough for the article to *contain* a board, panel, or base; instead, the article must itself be a board, panel or base.

The problem with Universal's argument, however, is that it fails to acknowledge the court's ultimate conclusion that: "[c]onsequently, the Court finds that the subject remote controls *are bases* upon which two or

more electrical devices of heading 8536 are mounted." (emphasis added). This conclusion is supported by Customs' expert who testified that "these remote control devices *are* clearly panels, boards and bases that contain many switches." The court's conclusion is also consistent with testimony from Universal's expert, who acknowledged that patents related to the subject imports routinely employed the terms "base" and "panel" to describe the devices. Accordingly, we perceive no clear error in the court's factual finding that the subject imports are bases.

IV

In conclusion, the presumption of correctness afforded to Customs' decisions is a procedural device that governs evidence. Accordingly, as *Goodman* stated, it has no force as to pure questions of law. Moreover, the presumption of correctness bears no relation to the deference afforded to Customs' decision, which is instead governed by standards of review. In the present case, we agree with the interpretation given the tariff provisions by the Court of International Trade. We also discern no clear error in that court's application of those provisions to the subject imports. Accordingly, the decision of the Court of International Trade is

AFFIRMED.

NSK LTD. AND NSK CORP, PLAINTIFFS-APPELLANTS *v.* UNITED STATES, DEFENDANT-APPELLEE, AND FEDERAL-MOGUL CORP, DEFENDANT, AND TORRINGTON CO., DEFENDANT-APPELLEE

Appeal No. 96-1359

(Decided June 10, 1997)

Robert A. Lipstein, Lipstein, Jaffe & Lawson, L.L.P., of Washington, D.C., argued for the plaintiffs-appellants. With him on the brief were *Matthew P. Jaffe* and *Grace W. Lawson*.

Velta A. Melnbrensis, Assistant Director, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, D.C., argued for defendant-appellee The United States. With her on the brief were *Frank W. Hunger*, Assistant Attorney General, and *David M. Cohen*, Director. Of counsel on the brief were *Stephen J. Powell*, Chief Counsel, *Berniece A. Browne*, Senior Counsel, *Mark A. Barnett*, Attorney, *Thomas H. Fine*, Attorney, and *Dean A. Pinkert*, Attorney, Office of the Chief Counsel for Import Administration, Department of Commerce, of Washington, D.C.

James R. Cannon, Jr., Stewart & Stewart, of Washington, D.C., argued for defendant-appellee The Torrington Company. With him on the brief were *Terence P. Stewart* and *Patrick J. McDonough*. Of counsel was *William A. Fennell*.

Appealed from: United States Court of International Trade.

Judge TSOUCALAS.

Before *PLAGER*, *RADER*, and *SCHALL*, *Circuit Judges*.

SCHALL, Circuit Judge.

This is an antidumping case. Plaintiff-Appellant NSK Ltd., a Japanese corporation, is a manufacturer and exporter of antifriction

bearings. Plaintiff-Appellant NSK Corporation, a United States corporation and a wholly-owned subsidiary of NSK Ltd., is an importer and manufacturer of antifriction bearings. Defendant-Appellee The Torrington Company ("Torrington") is a United States producer of antifriction bearings.¹

NSK Ltd. and NSK Corporation (collectively "NSK") appeal portions of the final decisions of the United States Court of International Trade in *NSK Ltd. v. United States*, 896 F. Supp. 1263 (Ct. Int'l Trade 1995), and *NSK Ltd. v. United States*, No. 92-07-00470, 1996 WL 109429 (Ct. Int'l Trade Mar. 7, 1996). In these decisions, the court decided the lawfulness of various aspects of the final results issued by the International Trade Administration, United States Department of Commerce ("Commerce"), in its review of the antidumping duty order in effect for antifriction bearings. Those final results are set forth in *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews*, 57 Fed. Reg. 28,360 (1992).²

Of relevance to this appeal, the court sustained the following decisions by Commerce: (i) samples that NSK gave free of charge to potential customers constituted "sales" under the antidumping laws; (ii) dumping margins for imported antifriction bearing parts that were used in the manufacture of complete antifriction bearings in the United States were computed by subtracting from the price of the complete antifriction bearings the value added by the United States manufacturer; (iii) home market credit expenses incurred by NSK Ltd. were not circumstances of sale expenses, for which an adjustment would be made to the foreign market value of NSK's merchandise; and (iv) early payment discounts and distributor incentive rebates extended by NSK Ltd. in the home market were not to be included in calculating NSK Ltd.'s cost of production for purposes of performing a cost test to determine whether merchandise was being sold by NSK Ltd. in the home market at prices below the cost of production. We affirm-in-part, reverse-in-part, and remand.

BACKGROUND

I.

The antidumping laws impose additional duties on imported products that are being sold, or are likely to be sold, at less than their fair value to the detriment of a domestic industry. 19 U.S.C. § 1673 (1988).³ The quantum of the additional duties is known as the "dumping margin,"

¹ Federal-Mogul Corporation (Federal-Mogul), also a United States producer of antifriction bearings, and a defendant below, is not a party to this appeal.

² As amended for clerical errors, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews*, 57 Fed. Reg. 59,080 (1992).

³ The antidumping laws were amended by the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 ("URAA"). The amendments, however, do not apply to administrative reviews initiated before January 1, 1995. See *Zenith Elecs. Corp. v. United States*, 77 F.3d 426, 428 n.1 (Fed. Cir. 1996). Because this case involves administrative reviews initiated before January 1, 1995, we use the antidumping laws in effect prior to the URAA. For simplicity, we will speak in the present tense when referring to the pertinent statutes.

and is equal to the amount by which the foreign market value exceeds the United States price for the merchandise. 19 U.S.C. § 1673; 19 C.F.R. § 353.2(f)(1) (1996).⁴ Thus, the additional duties are designed to correct the dumping margin. See *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1576 (Fed. Cir. 1993).

Foreign market value is computed based on one of three methods: (i) home market sales; (ii) third country sales; and (iii) constructed value. See 19 U.S.C. § 1677b(a)(1)-(2) (1988); *Smith-Corona Group v. United States*, 713 F.2d 1568, 1572-73 (Fed. Cir. 1983). Computation of foreign market value based on home market sales is preferred. See *Smith-Corona*, 713 F.2d at 1573. United States price is measured by either the purchase price or the exporter's sales price, depending on the nature of the relationship, if any, between the importer and the exporter. *Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1567 (Fed. Cir. 1994); see 19 U.S.C. § 1677a(a) (1988). The United States price will be the purchase price if the domestic importer is unrelated to, and independent of, the foreign producer. *Koyo Seiko*, 36 F.3d at 1567. On the other hand, the United States price will be the exporter's sales price if the importer and exporter are related, such as in this case, where the importer (NSK Corporation) is a subsidiary of the exporter (NSK Ltd.). See *id.* Purchase price is defined as "the price at which merchandise is purchased, or agreed to be purchased, * * * from a reseller or the manufacturer or producer of the merchandise for exportation to the United States." 19 U.S.C. § 1677a(b) (1988). Exporter's sales price is defined as the "price at which merchandise is sold or agreed to be sold in the United States * * * by or for the account of the exporter * * *." *Id.* § 1677a(c) (1988).

To ensure that dumping duties are calculated in a fair manner, foreign market value and United States price are subject to various adjustments to achieve a common basis for comparing prices. *Koyo Seiko*, 36 F.3d at 1568. Examples of such adjustments are found in 19 U.S.C. §§ 1677a(d)-(e) and 1677b(a)(1), (a)(4) (1988). Such adjustments may result from costs, charges, and expenses incurred as a result of exporting the goods from the home country to the United States. See *id.* For example, section 1677a(e)(3) provides that exporter's sales price is to be reduced by "any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise." At the same time, section 1677b(a)(4)(B) provides that foreign market value is to be adjusted for differences in "circumstances of sale." Such circumstances of sale include costs for "advertising, warranty and after sales services, packing costs, and after sales rebates." *Koyo Seiko*, 36 F.3d at 1568 (quoting *Smith-Corona Group*, 713 F.2d at 1573 n.12).

⁴ We cite to the most recent version of the regulations, unless a substantive change has been made since 1992, the year in which the events giving rise to the present dispute arose.

Finally, in its calculation of foreign market value, Commerce disregards sales of merchandise at below-cost, if certain conditions are met.⁵ 19 U.S.C. § 1677b(b) (1988). In order to determine whether merchandise is being sold at below-cost, section 1677b(b) provides that upon reasonable grounds for belief or suspicion, Commerce performs a cost test in which it determines whether merchandise has been sold "in the home market of the country of exportation" at prices lower than the "cost of producing the merchandise in question." To ensure that a fair comparison is made, Commerce includes selling and other expenses in both the home market price and the cost of production ("COP"). See, e.g., *Federal-Mogul Corp. v. United States*, 862 F. Supp. 384, 401 (Ct. Int'l Trade 1994) (remanding case to Commerce to take into account certain expenses to ensure that fair comparison of home market price and COP was made); *Nachi-Fujikoshi Corp. v. United States*, 798 F. Supp. 716, 721 (Ct. Int'l Trade 1992) (noting that to ensure fair comparison of home market price and COP, Commerce has often made allowances for rebates). Whenever Commerce disregards sales on the ground that they were made at less than the cost of production, and the remaining sales, which were not made at less than the cost of production, are deemed to be inadequate as a basis for the determination of foreign market value, Commerce uses the constructed value of the merchandise to determine foreign market value. *Id.*

This appeal involves two questions of law: (i) whether free samples of NSK merchandise imported into the United States should be included in the calculation of exporter's sales price for purposes of determining United States price; and (ii) whether Commerce's calculation of dumping margins for imported antifriction bearing parts was inconsistent with 19 U.S.C. § 1677a(e)(3) noted above. The appeal also involves two fact issues. The first is whether, in determining foreign market value for NSK merchandise, Commerce should have made allowance for certain home market credit expenses under 19 U.S.C. § 1677b(a)(4)(B), on the ground that the difference between the foreign market value of NSK's merchandise and its United States price was the result of the home market credit expenses creating a difference in the circumstances of sale. The second is whether, when Commerce conducted a cost test under 19 U.S.C. § 1677b(b) for NSK's merchandise, it should have included in COP as selling, general, and administrative ("SG&A") expenses certain discounts and rebates extended by NSK Ltd. in the home market.

II.

Unless otherwise noted, the facts are not in dispute. On May 3, 1989, Commerce issued final determinations in its less-than-fair-value ("LTFV") investigation relating to sales of antifriction bearings (other than tapered roller bearings) and bearing parts in various countries, including Japan. On May 15, 1989, as a result of the investigation, Com-

⁵ Those conditions are: (i) that the sales "have been made over an extended period of time and in substantial quantities," and (ii) that the sales "are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade." 19 U.S.C. § 1677b(b).

merce published antidumping duty orders with respect to various types of antifriction bearings and parts thereof from different countries, including Japan.⁶ Thereafter, Commerce engaged in a first administrative review covering the period November 9, 1988, to April 30, 1990, for which it issued final results on July 11, 1991.⁷

The second administrative review period—the period which is directly relevant to this appeal—was May 1, 1990, to April 30, 1991; Commerce initiated reviews for this period between June 28 and August 14, 1991.⁸ Commerce issued preliminary results for Japan in the second administrative review on March 31, 1992,⁹ and final results on June 24, 1992.¹⁰ During the second period of review, NSK gave away sample bearings to potential customers in the United States at no charge. Over NSK's objection, Commerce included these samples in the United States sales database and used them in calculating exporter's sales price—assigning them a zero price. In the final results for the second administrative review, Commerce explained that it included the samples because "goods entered for consumption are subject to an antidumping order wherever ownership transfers from the exporter of the goods to an unrelated U.S. purchaser." 57 Fed. Reg. at 28,395. Commerce found that NSK failed to show that it retained ownership of the samples after exportation to the United States. *Id.*

During the second administrative review period, NSK imported parts that were used in the manufacture of finished bearings in the United States before the finished bearings were sold to unrelated customers. Commerce had to determine the dumping margins, if any, for these imported parts. In the LTFV investigation and first administrative review, Commerce applied the dumping margins of the finished bearings to the parts because it felt that such margins would be a reasonable estimate of the antidumping duties for the parts. However, for the second administrative review period, Commerce requested that NSK provide certain information on the parts. In particular, Commerce requested that NSK provide pertinent information which would enable Commerce to con-

⁶ *Final Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan*, 54 Fed. Reg. 19,101 (1989). Generally, Commerce makes preliminary and final determinations as to whether merchandise is being sold, or likely to be sold, at less than its fair value in the United States. See 19 U.S.C. §§ 1673b(b)(1), 1673d(a)(1) (1988); *Texas Crushed Stone Co. v. United States*, 35 F.3d 1535, 1537 (Fed. Cir. 1994). If Commerce's findings in the final determination are in the affirmative, then the International Trade Commission ("ITC") makes a final determination of material injury to the United States. 19 U.S.C. § 1673d(b)(1) (1988). If the ITC determines that such injury exists, then Commerce issues an antidumping duty order. 19 U.S.C. § 1673d(c)(2) (1988).

⁷ *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany; Final Results of the Antidumping Duty Administrative Review*, 56 Fed. Reg. 31,692 (1991). Generally, an administrative review involves reassessing dumping margins; the results of an administrative review serve as the basis for the actual assessment of duties for entries of merchandise during the period covered by the review. See *Silver Reed Am., Inc. v. United States*, 9 CIT 221, 224 (1985).

⁸ See *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Initiation of Antidumping Administrative Reviews*, 56 Fed. Reg. 29,618 (1991); *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 56 Fed. Reg. 33,251 (1991); *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 56 Fed. Reg. 40,305 (1991).

⁹ *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 57 Fed. Reg. 10,868 (1992).

¹⁰ *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews*, 57 Fed. Reg. 28,360 (1992).

duct a further processing analysis of the parts. Such information included data on further processing and manufacturing in the United States. Using this information, Commerce calculated the exporter's sales price for the imported parts by deducting from the sales price of the finished bearings the costs of further processing done on the imported parts in the United States. The remaining sum represented the price of the imported parts. Commerce then calculated the dumping margins for the parts by subtracting the United States price (which was the exporter's sales price) from the foreign market value of the parts.

In its final results, Commerce explained that its decision in the first administrative review to not examine further-processed imported parts was based on the circumstances of that review. However, for the second administrative review, Commerce determined that information on these parts was necessary to determine whether they constituted a significant portion of the value of finished bearings. See 57 Fed. Reg. at 28,396-97.

In addition, in the final results of the second administrative review, Commerce did not adjust downward the foreign market value of NSK's merchandise for certain home market credit expenses which were incurred by NSK Ltd. and which NSK had argued should be considered circumstances of sale under section 1677b(a)(4). Commerce based its decision on the failure of NSK to submit the credit expenses on either a customer-specific or transaction-specific basis. 57 Fed. Reg. at 28,405. Commerce explained that while it had accepted an alternative method of reporting in the first administrative review—reporting the credit expenses on the basis of the best information otherwise available—it had warned respondents at that time that it would not accept such alternative methods of reporting thereafter. See *id.*; 56 Fed. Reg. at 31,724.

Finally, during a cost test investigation pursuant to 19 U.S.C. § 1677b(b) to determine whether NSK Ltd. was selling bearings in the home market at prices below COP, Commerce did not include early payment discounts and distributor incentive rebates as expenses for purposes of calculating NSK Ltd.'s COP. See 57 Fed. Reg. at 28,418. Thus, Commerce did not deduct these amounts from its calculation of NSK Ltd.'s home market prices.¹¹

III.

Pursuant to 19 U.S.C. § 1516(a)(2)(B)(i) (1988), NSK commenced an action in the Court of International Trade, challenging various aspects of the final results for the second administrative review. NSK alleged, *inter alia*, that Commerce erred in: (i) its utilization of samples as zero price "sales" in calculating exporter's sales price; (ii) its analysis of imported parts that were used in the manufacture of products within the same class or kind of merchandise that was subject to the antidumping orders; (iii) its failure to adjust foreign market value for NSK Ltd.'s

¹¹ To ensure that an even comparison is made in a cost test, Commerce includes the same expenses in home market price and COP. Therefore, Commerce deducts discounts and rebates from the sales prices of the home market unless they have been reported as expenses, including SG&A expenses, as part of COP.

home market credit expenses; and (iv) its failure to include early payment discounts and distributor incentive rebates as expenses in calculating NSK's COP for purposes of performing the section 1677b(b) cost test. In due course, Torrington and Federal-Mogul were allowed to intervene in the case as defendants.

The Court of International Trade issued a decision on August 1, 1995. In its decision, the court addressed Commerce's treatment of NSK's samples as zero-priced sales. The court found that Commerce had failed to adequately explain the standard it used to evaluate these samples, and therefore it remanded the issue to Commerce. *NSK Ltd. v. United States*, 896 F. Supp. 1263, 1268 (Ct. Int'l Trade 1995). Second, the court upheld Commerce's method of calculating the dumping margins for imported antifriction bearing parts used in the manufacture of antifriction bearings. *Id.* at 1271.

Additionally, the court sustained Commerce's rejection of NSK Ltd.'s home market credit expenses as circumstances of sale expenses for which a downward adjustment would be made to foreign market value. The court found that Commerce could alter its required reporting methodology when striving for more accuracy. *Id.* at 1275. Further, the court noted, Commerce adequately warned NSK in its final results for the first administrative review that its prior reporting methodology would be unacceptable in a second administrative review. *Id.* Finally, the court determined that Commerce was justified in not including NSK Ltd.'s early payment discounts and distributor incentive rebates in calculating COP for purposes of performing the section 1677b(b) cost test. *Id.* at 1277. The court noted that the burden was on NSK to establish entitlement to the adjustment. In that regard, the court determined that NSK had submitted to Commerce contradictory evidence—in the form of conflicting exhibits—and that NSK thus had failed to show that Commerce's decision was not supported by substantial evidence. *Id.* at 1276-77.

On remand, Commerce explained that it included zero-priced samples in its dumping analysis because of its "long-standing policy * * * to consider a transaction as a 'sale' for the purposes of the dumping analysis if the ownership of the merchandise in question is transferred from the respondent to [an] unrelated U.S. purchaser." Commerce noted that if the term "sale" required consideration, then a loophole would form that would allow the lowest priced U.S. transactions to escape review. Commerce also stated that even if consideration is a required element of a sale, it was present in this case. Commerce reasoned that the samples, if suitable, would make NSK a potential supplier, and if not suitable, NSK could alter its bearings accordingly. NSK appealed Commerce's remand determination to the Court of International Trade, but the court sustained the findings and conclusions. *NSK Ltd. v. United States*, No. 92-07-00470, 1996 WL 109429 (Ct. Int'l Trade Mar. 7, 1996). This appeal by NSK followed.

DISCUSSION

I.

NSK raises four contentions on appeal with respect to the second administrative review: (1) Commerce erred in including in its exporter's sales price calculation samples that NSK gave free of charge to potential customers in the United States; (2) Commerce erred in calculating the antidumping margins for imported antifriction bearing parts; (3) Commerce erred in not treating NSK Ltd.'s home market credit expenses as circumstances of sale expenses, thereby disallowing a downward adjustment to foreign market value for these expenses; and (4) Commerce erred in not including NSK Ltd.'s early payment discounts and distributor incentive rebates in NSK's COP when performing the section 1677b(b) cost test.

We review a decision of the Court of International Trade affirming or reversing the final results of an administrative review *de novo*. *Torrington Co. v. United States*, 82 F.3d 1039, 1044 (Fed. Cir. 1996); see *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1559 (Fed. Cir. 1984). In so doing, we "apply anew" the Court of International Trade's statutorily-mandated standard of review of the administrative review. *Torrington Co.*, 82 F.3d at 1044. Thus, pursuant to 19 U.S.C. § 1516a(b)(1)(B) (1994), we will uphold final results unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (citations omitted).

In determining the lawfulness of an agency's construction of a statute, we are guided by the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Under *Chevron*, the first question is "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842, 104 S. Ct. at 2781. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43, 104 S. Ct. at 2781.

If, however, the statute is "silent or ambiguous with respect the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S. Ct. at 2782 (footnote omitted). We have stated that "[t]o survive judicial scrutiny, an agency's construction need not be the *only* reasonable or even the *most* reasonable interpretation. Rather, a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another." *Koyo Seiko*, 36 F.3d at 1570 (citing *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S. Ct. 2441, 2445, 57 L. Ed. 2d 337 (1978)). Moreover, "[d]eference to any agency's statutory interpretation is at its peak in the case of a court's review of Commerce's interpretation of the antidumping laws." *Id.* (citing *Daewoo*

Elects. Co., Ltd. v. International Union of Electronic, Electrical, Technical, Salaried and Mach. Workers, AFL-CIO, 6 F.3d 1511, 1516 (Fed. Cir. 1993).

We note at the outset that Commerce's decision rejecting NSK Ltd.'s home market credit expenses as circumstances of sale expenses and its decision that NSK Ltd.'s early payment discounts and distributor incentive rebates were not to be included as part of COP were both factual determinations. This is because they concerned, respectively, (i) whether NSK reported the credit expenses on a proper basis under Commerce's standards; and (ii) whether NSK could show that the early payment discounts and distributor incentive rebates were part of its COP. Having reviewed the record, we have concluded that Commerce's decisions on these issues are supported by substantial evidence. Accordingly, in the balance of this opinion, we consider the first two issues raised on appeal.

II.

As seen above, in determining the United States price for NSK's anti-friction bearings, Commerce included in the United States sales database, and therefore used in computing exporter's sales price, sample bearings which NSK gave to potential customers in the United States at no charge. NSK argues that this was error.

The antidumping law provides that antidumping duties are assessed when "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value" to the detriment of a domestic industry. 19 U.S.C. § 1673 (1988) (emphasis added). As explained above, the antidumping duty equals the amount by which foreign market value exceeds the United States price for the merchandise, see 19 U.S.C. § 1673, and in this case, exporter's sales price is the proper measure of United States price. See *Koyo Seiko*, 36 F.3d at 1570. Exporter's sales price is defined in pertinent part in 19 U.S.C. § 1677a(c) as the "price at which merchandise is sold or agreed to be sold in the United States." (emphasis added). Commerce's regulations state that "[i]n calculating the United States price, the Secretary will use sales or, in the absence of sales, likely sales, as defined in § 353.2(t)." 19 C.F.R. § 353.41(a) (1996). Section 353.2(t) states that "[a] 'sale' includes a contract to sell and a lease that is equivalent to a sale. A 'likely sale' means a person's irrevocable offer to sell." 19 C.F.R. § 353.2(t) (1996).

The government argues that samples NSK imported into the United States and gave to potential customers at no charge constituted sales. If the government is correct, these samples should be given a "zero price" for purposes of calculating exporter's sales price under 19 U.S.C. § 1677a(a), thereby driving down the average United States price. A lower United States price, of course, means a larger difference between foreign market value and United States price, thereby increasing the dumping margin under section 1673. Thus, greater dumping duties will be assessed on the merchandise.

The government contends that neither the statutes nor the relevant regulations define the term "sale." It asserts that 19 C.F.R. § 353.2(t)

provides only a partial definition of sale because it states in pertinent part that "[a] 'sale' includes a contract to sell." (emphasis added). Because Congress has not spoken on the precise issue, the government argues, the court should defer to its interpretation under the second prong of the *Chevron* analysis. The government notes that it is long-standing policy to consider a transaction a "sale" for purposes of the dumping margin analysis if ownership of merchandise is transferred from an exporter to an unrelated United States purchaser. The government argues that this approach is permissible because it "prevents a loophole in the antidumping law that would allow the lowest priced U.S. transactions to escape review and would accordingly threaten the effective enforcement of the law."¹²

In addition, the government argues that even if consideration is a necessary component of a "sale," then consideration exists for the samples at issue in this case:

The samples were provided to the customer to determine the suitability of the bearing to the customers' needs. While the Department recognizes that the customers were under no obligation to subsequently purchase these bearings from NSK, a determination that the bearings were suitable would allow NSK to be a potential supplier whereas a determination of non-suitability would provide NSK with information necessary to allow it to alter the bearings in order to become a potential supplier at some future time. In light of the purposes of the antidumping laws, such consideration would be adequate to a determination that the transfers of the zero-priced samples constituted sales.

We disagree. The government is correct that there is no explicitly stated definition of the term "sale" or "sold" in the relevant statutory provisions or legislative history. However, we believe that Congress intended to give the term its ordinary meaning, thereby making any explicit definition unnecessary. As stated by the Supreme Court, "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB v. AMAX Coal Co.*, 453 U.S. 322, 329, 101 S. Ct. 2789, 2794, 69 L. Ed. 2d 672 (1981).

Black's legal dictionary defines sale as "[a] contract between two parties, called, respectively, the 'seller' (or vendor) and the 'buyer' (or purchaser), by which the former, in consideration of the payment or promise of payment of a certain price in money, transfers to the latter the title and the possession of property." *Black's Law Dictionary* (6th ed. 1990). In addition, Webster's Dictionary defines a sale as "the act of sel-

¹² To illustrate its contention, the government poses a hypothetical situation, in which the foreign market value of an item is ten dollars, and ten units are imported into the United States, with eight of the units being sold for ten dollars each and the remaining two units being designated "free samples." The government asserts that if the samples are disregarded, then the dumping margin will be zero. However, if the samples are included in United States price, then the average United States price will be eight dollars, resulting in a dumping margin of two dollars per unit, or twenty-five percent. The hypothetical, of course, is premised on the proposition that giving a sample away free of charge is no different from a sale. If giving a sample is different from a sale, however, there is no loophole.

ling: a contract transferring the absolute or general ownership of property from one person * * * to another for a price (as a sum of money or any other consideration) * * *." *Webster's Third New International Dictionary* 2003 (1986). Plainly, under the commonly accepted meaning of the term, consideration is a necessary element of a sale.

In addition, contrary to the government's suggestion, we do not believe that the term "sale" should be given any special meaning under the antidumping laws. The Court of Customs and Patent Appeals, a predecessor of this court, has held that "sale" should be given its ordinary meaning under the antidumping laws. In *J.H. Cottman & Co. v. United States*, 20 CCPA 344 (1932), the court was faced with determining whether certain transactions constituted proof of foreign market value under section 205 of the Antidumping Act of 1921, an issue dependent on whether the goods in question were considered "sold or freely offered for sale."¹³ *Id.* at 353. In its analysis of this clause, the court stated:

The statute with which we are dealing recites that, to constitute foreign-market value, the goods must be "sold or freely offered for sale." This expression should be given its ordinary meaning. The word "sale" is thus defined by Webster's New International Dictionary, 1932:

1. Act of selling; a contract whereby the absolute, or general, ownership of property is transferred from one person to another for a price, or sum of money, or loosely, for any consideration.

Such, also, is the usual meaning given to it by courts, unless by accompanying language, some other meaning is evidently intended.

Id. at 356 (citations omitted).

In *J.L. Wood v. United States*, 505 F.2d 1400 (CCPA 1974), the issue before the court was whether transactions between a Canadian exporter and its wholly-owned subsidiary, an American importer, constituted sales which should be considered in determining export value under section 402(b) of the Tariff Act of 1930.¹⁴ *See id.* at 1401-02. In analyzing the issue, the court stated:

The requirements of a 'sale' for purposes of sections 402(b) and 402(f)^[15] were not defined by the appellate term^[16], but * * * the legislative history clearly shows that Congress intended use of sales to exclusive agents in determining export value; and there is nothing to indicate that the word 'sales' was intended to have other than

¹³ Section 205 provided in pertinent part that: "the foreign market value of imported merchandise shall be the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is sold or freely offered for sale to all purchasers in the principal markets of the country from which exported * * *." (emphasis added).

¹⁴ Section 402(b) provided in pertinent part:

(b) Export value.—For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States * * *.

¹⁵ Section 402(f) was a definitional section.

¹⁶ Referring to the appellate term of the United States Customs Court, from which appeals were taken to the United States Court of Customs and Patent Appeals.

its ordinary meaning, namely: transfers of property from one party to another for a consideration.

Id. at 1406 (citing, inter alia, J.H. Cottman, 20 CCPA at 356).

We conclude that the term "sold," as used in 19 U.S.C. §§ 1673 and 1677a(c), requires both a transfer of ownership to an unrelated party and consideration. The terms of the statutory provisions are clear on their faces and we see no reason to depart from the ordinary meaning of the term "sold" or "sale." We thus need not reach the second prong of the *Chevron* analysis.

NSK's samples given to potential customers at no charge lacked consideration. Consideration generally requires a bargained-for exchange. 3 Williston on Contracts, § 7:2 at 18-19 (4th ed. 1992); 2 Corbin on Contracts, § 5.1 at 6 (Rev. ed. 1995); Restatement (Second) of Contracts, § 71 (1979). When the promisor may choose to perform based solely on whim, then the promise will not serve as consideration. 3 Williston on Contracts, § 7:7 at 89; see 2 Corbin on Contracts, § 5.28 at 142-43; Restatement (Second) of Contracts, § 2 cmt. e (1979); *Maccaferri Gabions, Inc. v. Dynateria, Inc.*, 91 F.3d 1431, 1443 (11th Cir. 1996). In this case, there is no evidence that potential customers had any obligation regarding samples received from NSK. These potential customers were free to transact with NSK based solely on their whim. In addition, we reject the government's argument that customer response to the free samples amounted to consideration because it provided NSK with information that presumably would be useful to it in altering the bearings to suit customer demand. Because NSK's samples did not constitute "sales," they should not have been included in calculating United States price. Therefore, that part of the Court of International Trade's decision which affirmed Commerce's interpretation of "sales" is reversed.

III.

We turn next to the issue of imported parts that are used in the manufacture of completed merchandise in the United States. Section 1677a(e) provides in pertinent part as follows:

For purposes of this section, the exporter's sales price shall * * * be adjusted by being reduced by the amount, if any, of—

* * * * *

(3) any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise.

19 U.S.C. § 1677a(e)(3) (1988).

The statute provides that adding value to imported merchandise causes the exporter's sales price to be reduced by the amount of the added value, thereby increasing the difference between foreign market value and United States price. This increase results in a larger dumping margin under section 1673 for the merchandise that has value added to it, with the result that greater dumping duties are assessed for that mer-

chandise. As noted above, in the LTFV investigation and first administrative review, Commerce used, as the dumping margins for imported antifriction bearing parts, the margin for the finished antifriction bearings. For the second administrative review period, however, Commerce sought to determine in more precise fashion the dumping margins for the parts. It sought to accomplish this by construing the United States price. As part of this effort, it requested that NSK provide information related to further processing of its imported parts that were used in the manufacture of finished bearings in the United States. This information was used by Commerce to calculate exporter's sales price for the imported parts by deducting from the sales price of the complete antifriction bearings the costs of further processing in the United States. In the final results for the second administrative review, Commerce explained that such information was necessary to determine whether the parts constituted a significant portion of the value of the finished bearings. See 57 Fed. Reg. at 28,396-97.

NSK argues that Commerce's calculation of the dumping margins for imported antifriction bearing parts was inconsistent with 19 U.S.C. § 1677a(e)(3). According to NSK, section 1677a(e)(3) does not encompass the situation presented here: imported parts being used in the manufacture of completed merchandise in the United States which is then sold to an unrelated party, where the completed merchandise is of the same class or kind of merchandise as the imported parts (*i.e.*, scope merchandise). NSK argues that the legislative history indicates that the section applies when imported merchandise is consumed in producing another product in the United States, but only when that product *differs* from the class or kind of merchandise covered by the antidumping duty order (*i.e.*, non-scope merchandise). Thus, NSK contends Commerce should not have backed out of the price of antifriction bearings manufactured in the United States costs of production and processing in order to arrive at a separate United States price for the imported parts. NSK urges that the imported parts should have been assigned the same dumping margins as those of the finished bearings.

In support of its contention, NSK cites a passage from a report of the Committee on Ways and Means of the House of Representatives:

This amendment [now contained in section 1677a(e)(3)] provides that whenever merchandise subject to an antidumping investigation or finding is imported by a person or corporation related to the exporter, *i.e.*, an exporter's sales price situation, and the merchandise is changed by further process or manufacture so as to remove it from the class or kind of merchandise involved in the proceeding before it is sold to an unrelated purchaser, such merchandise will not escape the purview of the law, but appropriate adjustments for the value added will be made to arrive at an exporter's sales price.

H.R. Rep. No. 93-571, at 70 (1973).

NSK argues that because the legislative history specifically speaks of the situation where imported merchandise is consumed in the manufacture of non-scope merchandise, Congress intended that the section not

apply when the imported merchandise is consumed in manufacturing scope merchandise.

The government, on the other hand, contends that clear statutory language indicates that section 1677a(e)(3) applies to all imported products covered by the proceeding which are further processed in the United States prior to their sale to an unrelated purchaser. The government argues that there is no language in the statute limiting the statute's application to the situation in which imported scope merchandise is processed into non-scope merchandise. The government further asserts that the legislative history cited by NSK merely explains that scope merchandise further processed into non-scope merchandise will not escape the purview of the antidumping laws.

We agree with the government. First, the language of section 1677a(e)(3) makes no distinction between merchandise that is further processed into non-scope merchandise and scope merchandise. Rather, by its terms, the statute applies to all merchandise covered by the antidumping duty order—from parts to complete products—that is further processed in some way in the United States before being sold to an unrelated party.¹⁷

Furthermore, the legislative history of section 1677a(e)(3), in particular the House Report cited by NSK, merely indicates that one cannot escape the purview of the antidumping laws by importing items that are further processed in the United States into non-scope merchandise. See H.R. Rep. 93-571, at 70 (1973). This report by no means limits the scope of the clear statutory language solely to this type of situation. Moreover, the Senate Report further supports the proposition that no such distinction was intended:

The first amendment would codify existing * * * regulations in providing that imported merchandise for which an exporter's sales price calculation must be made will not escape the purview of the [antidumping laws] by virtue of its being further processed or manufactured subsequent to its importation but before its sale to the first purchaser in the United States unrelated to the foreign exporter. Under the amendment, adjustments to the price at which the article is ultimately sold to an unrelated purchaser would be made in order to subtract out the value added to the merchandise after importation.

S. Rep. No. 93-1298, at 172-73 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7186, 7310. The report clearly makes no distinction between parts used in scope merchandise versus non-scope merchandise.¹⁸

¹⁷ An exception is the "Roller Chain" rule. Under this rule, Commerce excludes from its dumping analysis imported merchandise used in finished products which are sold to an unrelated person, where the imported merchandise constitutes an insignificant percentage of the finished products. See H.R. Rep. No. 93-571, at 70 (1973); *Koyo Seiko Co., Ltd. v. United States*, 92 F.3d 1162, 1165-66 (Fed. Cir. 1996). The Roller Chain rule is not implicated in this appeal.

¹⁸ Decisions by the Court of International Trade support a broad interpretation of the statute. See *Koyo Seiko Co., Ltd. v. United States*, 861 F.Supp. 108, 114 (Ct. Int'l Trade 1994) (finding that components placed in a box with another component to be sold as a tapered roller bearing set qualified "as additional material or labor and a 'process of assembly'"); *Daewoo Elecs. Co., Ltd. v. United States*, 760 F.Supp. 200, 210 (Ct. Int'l Trade 1991) (finding that replacing name brands on imported television receivers with private name plates was a value-added expense under section 1677a(e)(3)), *aff'd in-part and rev'd in-part on other grounds, sub nom. Daewoo Elecs. Co., Ltd. v. International Union of Electronic, Electrical, Technical, Salaried and Mach. Workers, AFL-CIO*, 6 F.3d 1511 (Fed. Cir. 1993).

Finally, NSK argues that Commerce in the original LTFV investigation and first administrative review recognized that section 1677a(e)(3) does not apply to imported bearing components consumed in the production in the United States of complete bearings. As noted by NSK, in the preliminary results of the first administrative review, Commerce stated that:

We have excluded from our price comparisons parts of bearings that were imported and further processed into finished bearings by U.S. affiliates of foreign exporters (prior to sale to unrelated U.S. customers). Both the bearing parts and the finished bearings are of the class or kind of merchandise subject to this review. We chose the alternative of applying any dumping margins found on imports of completed bearings to imported parts of the same class or kind.

56 Fed. Reg. at 11,187.

The argument is without merit. Commerce's actions in the LTFV investigation and first administrative review concerning the imported bearing parts in question were not its normal procedure; at that time, Congress was seeking to simplify the antifriction bearing proceedings. *See* 54 Fed. Reg. at 19,028. In addition, as can be seen from its statement in the preliminary results of the first administrative review, Commerce plainly recognized that the bearing parts were subject to the antidumping duty order. Thus, Commerce's action in the first administrative review cannot be taken as indicating that Commerce interpreted section 1677a(e)(3) as NSK contends.

CONCLUSION

The Court of International Trade erred in sustaining Commerce's interpretation of the term "sale" under the relevant antidumping provisions. However, it correctly sustained Commerce's other determinations in the second administrative review. Accordingly, the decision of the Court of International Trade is affirmed-in-part and reversed-in-part and the case is remanded to it for further proceedings consistent with this opinion.

COSTS

Each party shall bear its own costs.

**AFFIRMED-IN-PART,
REVERSED-IN-PART, AND REMANDED**

ROLLERBLADE, INC., PLAINTIFF-APPELLEE v.
UNITED STATES, DEFENDANT-APPELLANT

Appeal No. 96-1397

(Decided April 24, 1997)

Amy M. Rubin, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, International Trade Field Office, of New York, New York, argued for defendant-appellant. With her on the brief was Joseph I. Liebman, Attorney in Charge. Also with her on the brief were Frank W. Hunger, Assistant Attorney General, and David M. Cohen, Director, Department of Justice, of Washington, D.C. Of counsel on the brief was Mark G. Nackman, International Trade Field Office, of New York, New York.

Robert Torresen, Jr., Powell, Goldstein, Frazer & Murphy, of Washington, D.C., argued for plaintiff-appellee. With him on the brief were Richard M. Belanger and Todd J. Friedbacher.

Appealed from: United States Court of International Trade.
Judge POGUE.

Before RICH, CLEVENGER, and BRYSON, *Circuit Judges*.

CLEVENGER, *Circuit Judge*.

The United States appeals from the judgment of the United States Court of International Trade holding that the Customs Service (Customs) incorrectly classified the imported items at issue and ordering Customs to refund excess duties with interest to the importer, Rollerblade, Inc. (Rollerblade). We reverse because the items are properly classified as footwear and are not classifiable as parts of roller skates as the Court of International Trade held.

I

Rollerblade filed this lawsuit challenging Customs' classification of certain merchandise imported from August 3, 1988 to November 27, 1990. The imported items are referred to as "polyurethane shells" by Rollerblade and as "roller skate boots" by Customs. As discussed below, whether the items are roller skate boots (and thus are footwear) is critical to the outcome of this case.

Before January 1, 1989, Customs classified imported merchandise using the Tariff Schedules of the United States (TSUS). Customs classified the merchandise entered before January 1, 1989, as footwear under item 700.56, TSUS. The rate of duty for this classification was 6 percent *ad valorem*. Effective January 1, 1989, Customs began applying the Harmonized Tariff Schedule of the United States (HTSUS) instead. Customs classified the merchandise entered after January 1, 1989, as sports footwear under subheading 6402.19.10, HTSUS. The rate of duty for this classification was also 6 percent *ad valorem*.

Rollerblade claims that the proper classification for the merchandise entered before January 1, 1989, is under item 734.90, TSUS, which covers roller skates and parts thereof. Merchandise classified under this provision is free of duty. For the merchandise entered after January 1, 1989, Rollerblade asserts that the proper classification is roller skates

and parts and accessories thereof under subheading 9506.70.20, HTSUS. Merchandise classified under this provision is also free of duty.

As the Court of International Trade noted, the merchandise at issue "consists of rigid, molded plastic (polyurethane) boots which include a removable, padded vinyl liner. The bottom portion of each boot is molded to accommodate the permanent attachment of wheel frames and wheels." Both parties agree that the merchandise is not imported with wheel frames or wheels. Instead, wheel frames and wheels are attached to the bottom of the boots after the boots are imported, resulting in the end product of in-line roller skate outfits. The merchandise cannot be used for any purpose other than as the boot component of in-line skates.

The parties agreed that there are no disputed issues of material fact and filed cross-motions for summary judgment. The Court of International Trade held that although the imported items *prima facie* fall under both provisions—"footwear" and "parts of roller skates"—the items must be classified as "parts of roller skates" because that provision more specifically describes the merchandise. The court also noted the "anomaly" that would result if the court held otherwise—that a party importing a finished product with wheels, boots and all, incurs no duty liability, whereas a party assembling the wheels and boots in the United States, thereby creating domestic jobs, must pay duties.

II

We review the grant of summary judgment for correctness as a matter of law. *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994). The meaning of a tariff classification term, being a question of law, is also reviewed *de novo*. *Totes, Inc. v. United States*, 69 F.3d 495, 497-98 (Fed. Cir. 1995). Determining whether the items at issue come within a particular tariff provision, as properly interpreted, is a question of fact. *Id.* at 498. Here, the parties filed cross-motions for summary judgment and agree that there are no disputed issues of material fact. They agree that none of the pertinent characteristics of the merchandise is in dispute, and thus the sole issue is a matter of properly interpreting the classification term at issue—footwear—to determine whether the scope of that term is broad enough to encompass the items with the particular characteristics.

This step of interpreting the relevant classification term, as noted above, is a question of law to be decided independently by this court, without deference to Customs' interpretation. Customs, however, argues that its classification decisions should be entitled to deference based on either the statutory presumption of correctness under 28 U.S.C. § 2639(a)(1) (1994) or the *Chevron* doctrine, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). We do not find either argument meritorious here, where the sole issue concerns the proper scope of a classification term.

First, as for the statutory presumption, § 2639(a)(1) states (emphasis added):

(a)(1) Except as provided in paragraph (2) of this subsection, in any civil action commenced in the Court of International Trade under section 515, 516, or 516A of the Tariff Act of 1930, the decision of the Secretary of the Treasury, the administering authority, or the International Trade Commission is *presumed to be correct*. The burden of proving otherwise shall rest upon the party challenging such decision.

Customs cites a Court of International Trade decision, *Commercial Aluminum Cookware Co. v. United States*, 938 F. Supp. 875, 880–81 (Ct. Int'l Trade 1996), and argues that Customs' classification decision is presumed to be correct as a whole, including purely legal portions of the decision. Customs' and the Court of International Trade's (in *Commercial Aluminum*) interpretation of § 2639 is inconsistent with our precedent in *Goodman Manufacturing, L.P. v. United States*, 69 F.3d 505 (Fed. Cir. 1995). There, we squarely held that the statutory presumption of correctness under § 2639 is irrelevant where there is no factual dispute between the parties. *Id.* at 508.

Moreover, the court's duty to decide independently the meaning of a classification term is statutorily mandated. Section 2643(b), title 28, provides (emphasis added):

§ 2643 Relief

* * * * *

(b) If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to *reach the correct decision*.

Congress mandated the Court of International Trade to determine the scope of the classification. The Court of International Trade's charter to "reach the correct decision" in classification cases would be subverted if Customs' interpretation of a classification term was given deference. Thus, the court must independently decide legal issues; the court cannot shirk its responsibility of deciding what a classification term means by simply saying the challenger failed to persuade the court that its interpretation is more "correct" than that of Customs. It would indeed be anomalous if two entries of identical merchandise imported by two separate importers were to be classified differently because the first importer made a "poor" legal argument, and the second importer made a "good" legal argument.

Customs' argument for deference based on *Chevron* similarly fails. We have specifically held that *Chevron* deference does not apply to routine classification cases. *Crystal Clear Indus. v. United States*, 44 F.3d 1001, 1003 n.* (Fed. Cir. 1995). We also agree with the line of cases from the Court of International Trade that hold that the Court of Interna-

tional Trade's statutory mandate to find the correct result in a classification case is logically incompatible with *Chevron* deference. See, e.g., *Anval Nyby Powder AB v. United States*, 927 F. Supp. 463, 469 (Ct. Int'l Trade 1996); *Semperit Indus. Prods., Inc. v. United States*, 855 F. Supp. 1292, 1299-1300 (Ct. Int'l Trade 1994). We reiterate here that no *Chevron* deference applies to classification decisions by Customs.

In sum, no deference attaches to Customs' classification decisions either under 28 U.S.C. § 2639 or under *Chevron*, where there are no disputed issues of material fact.

III

The sole dispositive issue in this case concerns whether the imported items—whose pertinent characteristics are not disputed—are footwear within the meaning of item 700.56, TSUS and subheading 6402.19.10, HTSUS. Of the 108 entries at issue, seven entered before January 1, 1989, and thus are subject to the TSUS, and 101 entered pursuant to the HTSUS. If the scope of the term footwear is *prima facie* broad enough to encompass the items at issue, then as discussed below in section IV, the TSUS, the HTSUS, and the accompanying notes mandate the items be classified as such and not as "parts of roller skates."

We begin with the language of the pertinent classification sections (emphasis added):

700.56, TSUS

Footwear (whether or not described elsewhere in this subpart) which is over 50 percent by weight of rubber or plastics or over 50 percent by weight of fibers and rubber or plastics with at least 10 percent by weight being rubber or plastics:

Other footwear (except footwear having uppers of which over 50 percent of the exterior surface area is leather):

Having uppers of which over 90 percent of the exterior surface area is rubber or plastics (except footwear having foxing or a foxing-like band applied or molded at the sole and overlapping the upper):

* * * * *

Other.

6402, HTSUS

Other footwear with outer soles and uppers of rubber or plastics:

Sports footwear:

6402.19.10, HTSUS

Other:

Having uppers of which over 90 percent of the external surface area (including any accessories or reinforcements such as those mentioned in note 4(a) to this chapter) is rubber or plastics (except footwear having foxing or a foxing-like band applied or molded at the sole and overlapping the upper and except footwear designed to be worn over, or in lieu of other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather).

In short, both the TSUS and the HTSUS provisions above cover footwear with particular characteristics (such as rubber or plastics content). The parties agree that those particular characteristics are not at issue—the only issue is whether the imported items qualify as footwear.

Although neither the TSUS nor the HTSUS provides a definition for footwear *per se*, the accompanying notes shed light as to the scope of the term. We begin with the TSUS headnotes for the subpart quoted above (emphasis added):

Schedule 7, Tariff Schedules of the United States (TSUS):

Part 1, Subpart A—Footwear

Subpart A headnotes:¹

1. This subpart covers boots, shoes, slippers, sandals, moccasins, slipper socks (socks with applied soles of leather or other material), scuffs, overshoes, rubbers, arctics, galoshes, and all allied footwear (including athletic or sporting boots and shoes) *of whatever material composed, and by whatever method constructed, all the foregoing designed for human wear except—*

(i) footwear with permanently attached skates or snowshoes (see part 5D of this schedule),

(ii) hosiery (see part 6C of schedule 3), and

(iii) infants' knit footwear (see part 6F of schedule 3).

Thus, under TSUS, footwear is a broad term covering any wearing apparel for the human foot that is constructed by whatever method. See *Westminster Corp. v. United States*, 432 F. Supp. 1055, 1057 (Cust. Ct. 1977) (stating that footwear is a form of wearing apparel for the feet). None of the enumerated exceptions (i)–(iii) above applies here. In particular, exception (i) does not apply because the items as imported have no attached skates.

Moreover, United States Tariff Commission, *Summaries of Trade and Tariff Information* (Summaries), Vol. 4, at 137 (1968), indicates that skating boots of the type at issue here were intended to be classified as footwear and not as roller skate parts (emphasis added):²

For both roller and ice skates, the term "skates" covers (1) the shoe type, i.e., skates permanently attached (riveted) to boots or shoes (such skates are referred to in this summary as "skate outfits"), (2) skates made to be permanently attached to footwear, and (3) strap-on skates. Roller-skate outfits have plastic or wooden wheels, for use in indoor rinks, whereas strap-on skates usually have metal wheels suitable for use on sidewalks. Almost all of the ice skates sold in the United States have been skate outfits. The only strap-on ice skates sold in recent years have been negligible quantities of sled-like skates for small children. *Parts for ice and roller skates consist chiefly of plates, blades, and wheels.* The trade

¹ The headnotes in the TSUS "set forth rules of interpretation, define terms, express classification priorities, limit or modify the scope of particular provisions, and achieve other purposes." United States International Trade Commission, *Conversion of the Tariff Schedules of the United States Annotated into the Nomenclature Structure of the Harmonized System* 10 (1983).

² Although not controlling, the Summaries are nonetheless instructive on the meaning of a tariff term. See *United States v. Standard Surplus Sales, Inc.*, 667 F.2d 1011, 1015 n.4 (CCPA 1981).

in parts is insignificant. (*Shoes are classified under schedule 7 of the TSUS rather than as skate parts, even if of a type used for attachment to skates*).

Thus, Congress set forth a relatively simple and straight-forward classification system for roller skates and roller skate parts: a roller skate outfit may be comprised of top and bottom portions, where the top portion, regardless of the particular characteristics thereof, is called the boot (or the shoe) and the bottom portion is called the skate. The Summaries also make it clear that "parts of roller skates" were meant to cover the parts of the skates (such as plates, blades, and wheels), and not the boot. Thus, when a boot (without attached skates) intended for use in the manufacture of the roller skate outfit is imported, it is classified as footwear. However, when the boot is attached to the skate, the entire roller skate outfit, including the boot, is classified as a roller skate. Classifying the entire roller skate outfit as a roller skate was intended to eliminate Customs' unnecessary work in separately apportioning the value of the boot and the skate. See United States Tariff Commission, *Tariff Classification Study*, Schedule 7, at 285 (1960).

As for the HTSUS, the Explanatory Notes to chapter 64, HTSUS, indicate the broad scope of the term footwear (emphasis added):³

[w]ith certain exceptions * * * this Chapter covers * * * various types of footwear * * * *irrespective of their shape and size*, the particular *use* for which they are designed, their *method of manufacture* or the *materials* of which they are made.

In light of the similarity of the language of the "footwear" provisions under the two Tariff Schedules and accompanying notes and the lack of any legislative history to the contrary, we construe the term "footwear" under the HTSUS to cover the articles of the type at issue. That is, the "footwear" provision under the HTSUS encompasses shoes of the type used for attachment to skates, while the "roller skate parts" provision covers plates, blades and wheels.

Rollerblade raises several arguments as to why the imported items are not footwear: (1) the imported items at issue are neither usable nor marketable as wearable footwear in their condition as imported; (2) the items are unsuitable for normal walking; (3) the items derive their essential character from something other than the part that covers the foot, *i.e.*, from the contour of the bottom portion of the shell, which is specially designed to accommodate the permanent attachment of wheel frames during the manufacture of in-line roller skates; and (4) the term "skating boots" in the Schedules refers to the early forms of roller and ice skating boots that could be worn both for skating and as normal street shoes. Rather than elaborating on each of Rollerblade's arguments, we simply note that none of these arguments finds basis in, or is

³While the Explanatory Notes do not constitute controlling legislative history, they are nonetheless intended to clarify the scope of HTSUS subheadings and to offer guidance in interpreting its subheadings. *Mita Copystar*, 21 F.3d at 1082.

consistent with, the Tariff Schedules or any discernible legislative intent.

IV

Having determined that the items at issue are *prima facie* footwear, we now turn to the issue of whether they must be classified as such or as "parts of roller skates" as argued by Rollerblade. See *Jarvis Clark Co. v. United States*, 733 F.2d 873, 876 (Fed.Cir. 1984) ("The tariff schedules are so structured that many articles could fall under several different classifications, while others do not fit any classification perfectly."). The answer to that question is found in the Tariff Schedules themselves and the accompanying notes. We begin with item 734.90 of the TSUS (emphasis added):

734.90, TSUS

Skates (including footwear with skates permanently attached), and parts thereof:

Roller skates, and parts thereof.

Part 5, Subpart D—Games and Sporting Goods [TSUS]

Subpart D headnotes:

1. This subpart covers equipment designed for indoor or outdoor games, sports, gymnastics, or athletics, *but does not cover—*

* * * * *

(ii) *footwear, other than footwear with skates permanently attached* (see part 1A of this schedule);

Accordingly, roller skate boots (without skates attached), being footwear, are specifically excluded from the "roller skate parts" provision.

Similarly, the HTSUS and the accompanying notes exclude the roller skate boots (without skates attached) from the "roller skate parts" provision (emphasis added):

9506, HTSUS

Articles and equipment for gymnastics, athletics, other sports (including table-tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and wading pools; parts and accessories thereof:

9506.70, HTSUS

Ice skates and roller skates, *including skating boots with skates attached*; parts and accessories thereof:

9506.70.20, HTSUS

Roller skates and parts and accessories thereof.

Chapter 95, Harmonized Tariff Schedule of the United States:

Notes

1. This chapter *does not cover:*

* * * * *

(g) *Sports footwear (other than skating boots with ice or roller skates attached)* of chapter 64, or sports headgear of chapter 65 * * *

Despite the clear language of the Schedules and the attached notes, the Court of International Trade found that the imported items belonged to the "roller skate parts" provision, explaining (sentence numbering added):

[1] In fact, the provisions which the [Government] cites demonstrate the correctness of [Rollerblade's] claim that the merchandise is a part of a roller skate. [2] The plain language of the tariff schedule exclusion refers to "boots" or "footwear * * * with skates attached." [3] If the merchandise excluded from the footwear classification includes the boot, then the boot is a part of the excluded product. [4] The imported merchandise at issue here forms an integral part of the final roller skate. [5] Therefore, it is excluded from the footwear classification.

The Court of International Trade's error began with sentence 3 above. While it is true that the boot *is* a part of a tariff-free product (*i.e.*, the roller skate outfit), that does not mean that the boot itself is tariff-free. That logic is analogous to stating that an automobile tire is tariff-free if an automobile is tariff-free. An item must be evaluated for tariff purposes in its condition as imported. *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1577 (Fed. Cir. 1989).

However, we are, as the Court of International Trade apparently was, sympathetic with Rollerblade's situation. Imposing tariffs on the in-line roller skate boots while not imposing tariffs on the finished in-line roller skate outfits puts companies like Rollerblade, who import the boots and assemble the outfits in the United States, at a competitive disadvantage relative to those who import finished roller skate outfits. This odd phenomenon is referred to as tariff inversion and was recognized by Congress itself. Senate Report No. 101-252, at 31 states:

Section 1412. Certain in-line roller skate boots

Roller skates consist of boots with skates attached. These are imported, mostly from Taiwan, as "sports equipment," HTS subheading 9506.70.20, free of duty. A U.S. company currently manufactures skates and attaches them to boots, but in doing so it finds itself at a commercial disadvantage because boots without skates attached are classified as sports footwear with outer soles and uppers of rubber or plastics under HTS 6402.19.10, subject to a duty of 6 percent *ad valorem*. This phenomenon, known as tariff inversion, puts the U.S. production of components at risk. Therefore, the Committee approved a temporary suspension of the duty on boots without skates attached, provided the boots are actually used in the manufacture of roller skates.

S. Rep. No. 101-252, at 31 (1990), *reprinted in* 1990 U.S.C.A.N. 928, 958. Thus, Congress noted the tariff inversion problem and rectified it by enacting a temporary suspension of the duty on boots without skates attached. However, in doing so, Congress considered suspending the

duty retroactive to April 30, 1986, but chose not to.⁴ The items at issue entered before the effective date of the 1990 "temporary suspension" act. Under these circumstances where the meaning of the classification term is clear, we must enforce the classification system as written by Congress—however anomalous the tariff inversion may seem, even to Congress itself.

V

The imported items are footwear and must be classified as such under item 700.56, TSUS, and subheading 6402.19.10, HTSUS, not as parts of roller skates under item 734.90, TSUS, and subheading 9506.70.20, HTSUS. Accordingly, the judgment of the Court of International Trade is hereby reversed.

REVERSED

NTN BEARING CORP OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP AND NTN CORP, PLAINTIFFS-APPELLANTS v. UNITED STATES AND U.S. DEPARTMENT OF COMMERCE, RONALD H. BROWN, SECRETARY OF COMMERCE, DEFENDANTS-APPELLEES, AND TIMKEN CO., APPELLEE

Appeal No. 96-1436

(Decided August 20, 1997)

Kazumune V. Kano, Barnes, Richardson & Colburn, of Chicago, Illinois, argued for plaintiffs-appellants. On the brief was *Donald J. Unger*. Of counsel was *Jesse M. Gerson*.

Velta A. Melnbrensis, Assistant Director, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, D.C., argued for defendants-appellees. With her on the brief were *Frank W. Hunger*, Assistant Attorney General, and *David M. Cohen*, Director. Of counsel on the brief were *Stephen J. Powell*, Chief Counsel for Import Administration, *Elizabeth C. Seastrum*, Senior Counsel, and *Carlos A. Garcia*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, D.C.

James R. Cannon, Jr., Stewart and Stewart, of Washington, D.C., argued for appellee. With him on the brief were *Terence P. Stewart* and *William A. Fennell*.

Appealed from: United States Court of International Trade.
Judge TSOUALAS.

Before NEWMAN, RADER, and SCHALL, *Circuit Judges.*

⁴ The action was described in the conference report as follows (emphasis added):

In-line roller skate boots (section 430 of House bill; section 1412 of Senate amendment; section 429 of conference agreement)

Present Law

Imports of boots actually used in the manufacture of in-line roller skates enter under HTS subheading 6402.19.10 with a column 1 general rate of duty of 6 percent ad valorem.

House Bill

Suspends the column 1 general rate of duty for item 6402.19.10 through December 31, 1992.

Senate Amendment

Identical provision, except for additional retroactive duty-free treatment to April 30, 1986.

Conference Agreement

The Senate recedes.

136 Cong. Rec. H5946 (daily ed. July 30, 1990) (joint explanatory statement of the committee of conference).

RADER, *Circuit Judge*.

This case presents yet another challenge to the Department of Commerce's (Commerce's) actions on antidumping duties for tapered roller bearings (TRBs). In this case, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, and NTN Corporation (collectively, NTN) dispute Commerce's calculation of the fair market value for TRBs. Because substantial evidence supports Commerce's actions, this court affirms.

I.

This court has documented the details of Commerce's administrative reviews of TRBs in dozens of opinions. See, e.g., *NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997); *Koyo Seiko Co. v. United States*, 92 F.3d 1162 (Fed. Cir. 1996); *Torrington Co. v. United States*, 82 F.3d 1039 (Fed. Cir. 1996); *Koyo Seiko Co. v. United States*, 66 F.3d 1204 (Fed. Cir. 1995). Therefore, this opinion need not repeat a historical review of Commerce's investigation. However, the construction of TRBs is of particular relevance in this case. TRBs are a type of antifriction bearing made up of an inner ring (cone) and an outer ring (cup). Cups and cones sell either individually or as a pre-assembled "set."

Commerce's fundamental task in an antidumping investigation is to compare the United States price of imported merchandise with the value of "such or similar merchandise" in the home market, 19 U.S.C. § 1677(16) (1988),¹ and assess a duty, known as a dumping margin, for any deficiency. When Commerce identifies "such" or identical home market merchandise, the comparison between matched goods is easy and accurate. Without identical goods for value comparison, Commerce must find "similar" home market merchandise to make a proper comparison with the imports.

Commerce has established methods to determine the constructed value of "similar" merchandise in the home market. See 19 U.S.C. § 1677(b)(2) (1988). First, Commerce "splits" sales of TRB sets sold in Japan into their component cups and cones. Next, Commerce compares the cups and cones with their imported counterparts using five physical criteria: (1) inner ring bore (inside diameter); (2) outer ring diameter; (3) width; (4) load rating; and (5) "Y" factor (measure of thrust load capability). Finally, Commerce uses a "sum of deviations" method, coupled with a twenty percent difference-in-merchandise test, to find the best matching TRB model.

After assessment of duties, NTN appealed to the Court of International Trade challenging eleven actions by Commerce as against the substantial evidence on the agency record or against the requirements of law. In April 1996, the trial court denied in all respects NTN's motion for judgment on the agency record. *NTN Bearing Corp. of Am. v. United States*, 924 F. Supp. 200 (Ct. Int'l Trade 1996). Specifically, the Court of

¹ This section was amended on December 8, 1994. As both Commerce's administrative review and the Court of International Trade's adjudicatory proceeding were conducted under the statute as written prior to the 1994 amendment, we will refer to the statute in its pre-amended form. The amendment does not affect the outcome in this case.

International Trade held that Commerce's set-splitting method prevents an importer from manipulating home market calculations.

Conceding that Commerce may split sets to calculate fair market value, NTN raises only one issue on appeal, namely, the judgment upholding Commerce's splitting of certain "unsplittable" TRB sets. NTN claims that because it never separately sells the cups and cones of certain bearing models—TRB units, TRB double row models, TRB thrust bearings, TRB flanged bearings, and TRB high precision models—Commerce cannot calculate fair market value based on the constituent parts of these bearings. NTN contends that Commerce exceeded its discretion by applying its set-splitting methodology to these unsplittable sets.

II.

This court must sustain Commerce's administrative determinations unless they are unsupported by substantial evidence or not in accordance with law. *Zenith Elecs. Corp. v. United States*, 77 F.3d 426, 430 (Fed. Cir. 1996); 19 U.S.C. § 1516a(b)(1)(B). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Moreover, this court defers to Commerce's interpretation of the antidumping statute as long as it is reasonable. See *Zenith Elecs.*, 77 F.3d at 430.

In this case, the relevant inquiry is whether the trial court properly sustained Commerce's use of its set-splitting method to split "unsplittable" sets in arriving at a value for "similar merchandise." The Tariff Act of 1930, as amended in 19 U.S.C. § 1677(16) (1988),² broadly defines the phrase "such or similar" as applied to goods for comparison under the antidumping test. Because it does not specify a method for matching a U.S. product with a suitable home-market product, the Act has implicitly authorized Commerce to choose a way to identify "such or similar" merchandise. *Koyo Seiko Co.*, 66 F.3d at 1209 (testing the reasonableness of Commerce's construction of the statute).

This court has previously upheld Commerce's set-splitting and sum of deviations methods to identify "such or similar" goods for the antidumping comparison. See, e.g., *id.* at 1204. These earlier decisions have stressed that Commerce possesses discretion to calculate the fair mar-

²The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:

(A) The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.

(B) Merchandise—

(i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,
(ii) like that merchandise in component material or materials and in the purposes for which used, and
(iii) approximately equal in commercial value to that merchandise.

(C) Merchandise—

(i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,
(ii) like that merchandise in the purposes for which used, and
(iii) which the administering authority determines may reasonably be compared with that merchandise.

Section 1677(16) has been revised, *inter alia*, by the substitution of "foreign like product" for "such or similar merchandise" and the deletion of the phrase "which is the subject of an investigation" from subsections (A) and (B). 19 U.S.C. § 1677(16) (1994).

ket value based upon a "close-as-possible" matching of physical characteristics of separate cups and cones. Moreover, this method does not require an identical match of home market and imported cups and cones. Rather, Commerce remains within its discretion when it strives to find price data for closely analogous bearing components.

The five unsplittable sets at issue always sell as "sets" in the United States market. When the sets enter the United States, Commerce attempts to match those imports with "such" or identical sets in the home market. In this case, however, Commerce could not find "such" sets for an identical match. To identify "similar" sets to compare with the imported unsplittable TRB models, Commerce split the incoming sets as well as other like Japanese sets, into their component cups and cones. Commerce then performed a critical physical analysis on each cup and cone, placing the Japanese components into a "pool" of potential "such or similar" home market TRB cups and cones. Finally, Commerce applied its "sum of deviation" methodology and a twenty percent difference-in-merchandise test, to determine the best matching TRB model sets in Japan to compare with the imports, based on comparable components.

Without "such" or identical home market goods after a reasonable search for a match, Commerce reasonably applied its splitting methodology to unsplittable sets to identify "similar" goods for a value comparison. This reasonable method was, therefore, in accord with the statute. *See, e.g., id.*, 66 F.3d at 1210 ("Matching 'such or similar' home-market merchandise with certain U.S. merchandise is all that the statute requires."). The antidumping act simply does not require the sale of "similar" merchandise in the same manner in both the United States and home markets. Likewise, the act does not prohibit the separation of unsplittable sets. In fact, unsplittable sets is a bit of a misnomer. A more accurate description might be "currently not split" sets. This distinction acknowledges the trial court's reasoning that acceptance of NTN's argument would potentially circumvent the law by allowing an importer to manipulate Commerce's determinations by selling TRB components individually rather than in sets. In the absence of a prohibition against splitting these sets, Commerce's actions are reasonable.

Thus, the Court of International Trade properly upheld Commerce's actions as supported by substantial evidence and in accordance with law.

COSTS

Each party shall bear its own costs.

AFFIRMED

TRAVENOL LABORATORIES, INC., PLAINTIFF-APPELLANT v.
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 96-1534

(Decided July 2, 1997)

Mark S. Zolno, Katten, Muchin & Zavis, of Chicago, Illinois, argued for plaintiff-appellant. With him on the brief was Michael E. Roll. Of counsel on the brief was Charles R. Mattenson, Corporate Counsel, Baxter Healthcare Corporation, of McGaw Park, Illinois.

James A. Curley, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were Frank W. Hunger, Assistant Attorney General, and David M. Cohen, Director, of Washington, D.C., and Joseph I. Liebman, Attorney in Charge, International Trade Field Office, of New York, New York. Of counsel on the brief was Sheryl A. French, Office of Assistant Chief Counsel, United States Customs Service, of New York, New York.

James F. O'Hara, Stein Shostak Shostak & O'Hara, of Los Angeles, California, for amicus curiae Nike, Inc. and Nissso Iwai American Corporation. Of counsel on the brief was Michael P. Maxwell, Law Offices of Michael P. Maxwell, of Los Angeles, California.

Michael P. Maxwell, Law Offices of Leonard M. Fertman, P.C., of Los Angeles, California, for amicus curiae Technicolor Videocassette, Inc. Corporation.

Steven P. Kersner, Kersner & Associates, of Washington, D.C., for amicus curiae Dal-Tile Corporation. With him on the brief was Roger Banks.

Appealed from: United States Court of International Trade.

Judge AQUILINO, JR.

Before MICHEL, *Circuit Judge*, FRIEDMAN, *Senior Circuit Judge*, and CLEVENGER, *Circuit Judge*.

CLEVENGER, *Circuit Judge*.

This case asks whether certain provisions of the Customs Modernization Act (Mod Act) apply to goods entered before, but liquidated after, that act's effective date of December 8, 1993. The Customs Service (Customs) contends, and the Court of International Trade agreed, that application of those provisions to such goods would be retroactive and impermissible, given the lack of a clear statement by Congress that it intended those provisions to be applied retroactively. Because we conclude that application of the relevant provisions of the Mod Act to the goods in question would not be retroactive, we reverse.

I

Between 1985 and 1992, Baxter Healthcare Corporation (Baxter) imported medical devices used in renal dialysis.¹ Customs classified the devices as dutiable "electro-medical apparatus" and required Baxter to deposit estimated duties on each entry of devices. When Customs liquidated the goods as entered, Baxter filed a protest, arguing that its products were entitled to duty-free entry as "articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons." Customs, however, denied Baxter's protest.

Baxter challenged Customs' classification decision in the Court of International Trade. That court agreed with Baxter that the goods were

¹ Baxter is the successor to Travenol Laboratories, Inc.

entitled to duty-free entry, and entered final judgment on February 3, 1993, directing Customs to reliquidate the entries duty-free and to refund the excess duties deposited, with interest "as provided by law."² The entry at issue in the present case was reliquidated on August 18, 1995. The dispute in this case concerns the quantum of interest that must be paid on the reliquidated entry.

The law relating to interest owed changed on December 8, 1993, when Congress enacted the Mod Act as part of the North American Free Trade Implementation Act. Pub. L. No. 103-182, 107 Stat. 2057 (codified in scattered sections of 19 U.S.C.). Section 642 of the Mod Act amends 19 U.S.C. § 1505 to provide:

(c) Interest—Interest assessed due to an underpayment of duties, fees, or interest shall accrue, at a rate determined by the Secretary, from the date the importer of record is required to deposit estimated duties, fees, and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation. *Interest on excess moneys deposited shall accrue, at a rate determined by the Secretary, from the date the importer of record deposits estimated duties, fees, and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation.*

19 U.S.C. § 1505(c) (1994) (emphasis added). This change became effective upon enactment. See Mod Act § 692, Pub. L. No. 103-182, 107 Stat. 2225.

Pursuant to the judgment of the Court of International Trade, Customs reliquidated the entries duty-free and refunded the duties previously paid by Baxter. In doing so, Customs provided interest, based on 28 U.S.C. § 2644, from the date Baxter filed the summons for each entry to the date of refund.³ Baxter protested this reliquidation, contending that under amended section 1505(c) interest should be paid for the entire time span from the date of deposit to the date of refund, rather than simply from the date of filing summons for each entry to the date of refund (under § 2644). When Customs denied this protest, Baxter filed a Motion to Enforce Judgment with the Court of International Trade, seeking the additional interest, computed from the date of deposit to the date of summons for each entry, to which it asserted entitlement.

II

Before the Court of International Trade, the parties disputed whether application of amended section 1505(c) to Baxter's entries would constitute a retroactive application of that statute. In arguing that it would not, Baxter cited *Syva Co. v. United States*, 681 F. Supp. 885 (Ct. Int'l Trade 1988), for the proposition that liquidation (as in that case) or reliquidation (as in the present case) is the operative event triggering the time for assessment of interest. Because the entries at issue were reliquidated,

² The judgment pertaining to the entries in this case was entered on February 3, 1993. On November 29, 1993, and on December 8, 1993, the court also entered similar judgments pertaining to other entries.

³ "If, in a civil action in the Court of International Trade . . . the plaintiff obtains monetary relief by a judgment or under a stipulation agreement, interest shall be allowed . . . Such interest shall be calculated from the date of the filing of the summons in such action to the date of the refund." 28 U.S.C. § 2644 (1994).

updated after the effective date of the Mod Act, Baxter argued that application of section 1505(c) to those goods is prospective, not retroactive.

The court, however, agreed with Customs that the relief sought by Baxter would amount to a retroactive application of section 1505(c). While acknowledging the statements in *Syva* that liquidation is the triggering event for assessing interest, the court determined that matters had changed under the amended laws, and that deposit of estimated duties is now the triggering event. The court was led to this conclusion, in part, because the amended statute directs that interest "shall accrue" from the date of deposit to the date of reliquidation. Because deposits for the subject imports had already been paid by the time section 1505(c) was amended, the court concluded that applying it to those deposits would constitute a retroactive application of that law.

Having decided that Baxter was seeking a retroactive application of the law, the court next considered whether Congress had made a clear statement of an intent that section 1505(c) apply retroactively. After analyzing the statute's language as well as its legislative history, the court failed to find the requisite clear statement of retroactive intent. Accordingly, the court denied Baxter's motion to enforce. Baxter appeals.

We review Baxter's appeal from the judgment of the Court of International Trade pursuant to 28 U.S.C. § 1295(a)(5) (1994). The dispositive issue in the present case is the proper interpretation of section 1505(c), a question of law that we review *de novo*. See *Medline Indus., Inc. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995).

III

As the United States Supreme Court has stated, retroactivity in general is not favored in the law and, accordingly, legislation will be construed to operate only prospectively unless Congress has clearly expressed a contrary intention. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 264, 268 (1994). Under this standard, the first issue is whether application of legislation to certain facts constitutes a retroactive application of that law. Only if the answer to that question is "yes" must we search for a clear expression of congressional intent to apply the law retroactively.

Deciding if application of legislation would be retroactive is not a simple or mechanical task but is instead one that "comes at the end of a process of judgment." *Id.* at 268-70. Although there exist no hard and fast rules for this decision, we are aided by guidance provided by prior law, which has focused on the interrelationship between the new law and past conduct. Typical of these prior cases is the following formulation by the First Circuit: "The determination of whether a statute's application in a particular situation is prospective or retroactive depends upon whether the conduct that allegedly triggers the statute's application occurs before or after the law's effective date." *McAndrews v. Fleet Bank of Mass., N.A.*, 989 F.2d 13, 16 (1st Cir. 1993); see also *Kaiser Aluminum &*

Chem. Corp. v. Bonjorno, 494 U.S. 827, 857 n.3 (explaining that the inquiry "depends upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated") (Scalia, J., concurring); *Landgraf*, 511 U.S. at 270 (stating that the inquiry requires consideration of "the degree of connection between the operation of the new rule and a relevant past event").

Therefore, we must evaluate the importing process in an effort to find the event that triggers the application of section 1505(c). An importer is required to deposit estimated duties with Customs at the time of importation.⁴ 19 C.F.R. § 141.101 (1996). At some later time, Customs reviews the entry and makes its final determination as to whether the amount of duty deposited is correct—i.e., Customs liquidates the entry. See 19 C.F.R. §§ 159.0–.12 (1996). If an importer is dissatisfied with the liquidation, it may file an administrative protest within ninety days of liquidation. 19 U.S.C. § 1514(a)(5), (c)(3) (1994). If Customs denies the protest, the importer may seek judicial review in the Court of International Trade. 28 U.S.C. § 1581(a) (1994). That court may either sustain Customs' determination, or it may require Customs to reliquidate the entry at another duty rate.

The statutory provision at issue, section 1505(c), relates to interest—specifically, interest owed for either an underpayment or overpayment of estimated duties. As the foregoing demonstrates, Customs does not determine whether there has been an overpayment or underpayment of estimated duties until it liquidates or reliquidates an entry. See 19 U.S.C. § 1500 (1994); 19 C.F.R. § 159.1 (defining liquidation as "the final computation or ascertainment of the duties * * * accruing on an entry"). Until that time, both Customs and the importer are on notice that changes may occur. See *Dart Export Corp. v. United States*, 43 C.C.P.A. 64, 76 (1956).⁵ Indeed, as our predecessor court has stated, liquidation is "long honored in customs procedure as the final reckoning of an importer's liability on an entry." *Farrell Lines, Inc. v. United States*, 667 F.2d 1017, 1020 (CCPA 1982). Liquidation (or reliquidation), therefore, determines whether there has been an overpayment or underpayment, and thus defines the basis upon which interest might be due. Because section 1505(c) comes into play only after there has been a determination that interest is due, we conclude that liquidation (or reliquidation) is the triggering or operative event for determining whether or not application of section 1505(c) is retroactive. If the goods are liquidated or reliquidated after December 8, 1993, section 1505(c) applies to them.

⁴ More precisely, an importer must prepare an "entry" within five days of arrival of the goods. 19 C.F.C. § 142.2(a) (1996). Customs reviews the entry and authorizes the release of goods. Within ten days of release, the importer must prepare and submit an "entry summary" to Customs with payment of "estimated duties." 19 C.F.R. §§ 141.101, 142.12(b), 142.16 (1996).

⁵ The retroactivity inquiry also requires us to consider "whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270. The Mod Act provision relating to interest does not attach new legal consequences to any events that occur before liquidation because, being preliminary in nature, those events do not give rise to interest liability. The event that gives rise to interest liability is liquidation or reliquidation, which, in the present case, had not been completed before the new provision became effective.

Our conclusion is consistent with prior decisions of the Court of International Trade, which also recognized liquidation as the operative event for purposes of determining interest. In *Syva*, the importer entered the subject goods in May 1984, claiming duty free treatment. On November 29, 1984, Congress enacted an amendment that prescribed the time when liquidated duties are due and provided for interest on delinquent duty payments. On December 28, 1984, Customs rejected the importer's claim for duty free treatment and liquidated the entry at the applicable duty rate. The importer ultimately paid the duties in January 1986, but did not pay any interest. *Syva*, 681 F. Supp. at 886.

When the importer challenged Customs' decision in the Court of International Trade, Customs sought dismissal of the suit for lack of jurisdiction. Specifically, Customs contended that the importer was required to pay all duties, charges, and exactions before suing in the Court of International Trade, and the importer's failure to pay interest constituted a violation of this requirement. *Id.* at 887. The importer responded that requiring it to pay interest on goods entered before (although liquidated after) enactment of the legislative amendment would be retroactive. *Id.* at 889. The court disagreed, stating the following:

As the statute merely prescribes the time for payment of duties once the entries are liquidated, and *since liquidation, the operative event triggering the time for assessment of interest, occurred after the statute was enacted, there is no retroactive application which would deprive plaintiff of any vested substantive right.*

Syva, 681 F. Supp. at 890 (emphasis added).

The circumstances in *Syva* are quite similar to those in the present case. In each case, goods were entered before, but liquidated (or reliquidated) after, legislation providing for the payment of interest. In each case, the party required to pay interest sought to avoid the obligation by arguing that application of the legislation to those entries would be retroactive.

Customs seeks to distinguish *Syva* based on differences between the legislation at issue in that case and that at issue here. Customs argues that liquidation was the operative event in *Syva* because that statute provided that interest became payable if duty was not paid within 30 days of liquidation. In other words, interest began to accrue only after liquidation occurred. In contrast, Customs argues, the provision at issue in the present case provides that "[i]nterest on excess moneys deposited shall accrue * * * from the date the importer of record deposits estimated duties." 19 U.S.C. § 1505(c) (emphasis added). Under this provision, Customs argues, the triggering event is the date the duties were deposited because interest begins to accrue on that date. Because amended section 1505(c) had not been enacted when Baxter deposited excess moneys in February 1988, Customs argues, interest did not begin to accrue at that time.

We are not persuaded by Customs' argument. It is not logical to state that interest begins to accrue on the date that estimated duties are de-

posited, because the principal amount (*i.e.*, the amount of underpayment or overpayment) is not known as of that date. As explained above, the principal amount is not determined until liquidation or reliquidation. Only once there has been a determination that an underpayment or overpayment existed can either party become entitled to receive interest.

To be sure, once it is determined that interest is owed, measurement of the quantum requires consideration of the date when estimated duties were deposited. It is to this measurement function that the statutory language is directed when it states that interest "shall accrue * * * from the date the importer * * * deposits estimated duties." The mere fact that the new legislation requires reference to antecedent events or data, however, does not make its application retroactive. *Landgraf*, 511 U.S. at 269; *McAndrews*, 989 F.2d at 16 (stating that "a statute does not operate retroactively simply because its application requires some reference to antecedent facts"). Therefore, the statutory language that interest "shall accrue" does not alter the triggering event for application of section 1505(c); that event remains liquidation or reliquidation. The statutory language merely informs the measurement of the amount owed.

In conclusion, we hold that application of amended section 1505(c) to goods entered before, but liquidated (or reliquidated) after, its effective date of December 8, 1993, does not constitute a retroactive application of that provision. In the present case, it is undisputed that the entries at issue were entered before, but reliquidated after, December 8, 1993. Therefore, we conclude that application of amended section 1505(c) to those goods does not constitute a retroactive application of that statutory provision. As a result, we need not reach the issue of whether Congress clearly intended that provision to apply retroactively.

IV

For the reasons stated, the decision of the Court of International Trade is reversed.

No costs.

REVERSED

CELESTAIRE, INC., PLAINTIFF-APPELLANT *v.*
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 97-1005

(Decided July 29, 1997)

George R. Tuttle III, of San Francisco, California, argued for plaintiff-appellant. Mikki Graves Walser, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of New York, New York, argued for defendant-appellee. With her on the brief were Frank W. Hunger, Assistant Attorney General, David M. Cohen, Director, of Washington, D.C., and Joseph I. Liebman, Attorney in Charge, International Trade Field Office, of New York, New York. Of counsel on the brief was Beth C. Brotman, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, of New York, New York.

Appealed from: United States Court of International Trade.

Judge WALLACH.

Before MICHEL, PLAGER, and CLEVINGER, *Circuit Judges*.MICHEL, *Circuit Judge*.

Celestaire, Inc. ("Celestaire") appeals the order of the United States Court of International Trade granting summary judgment to the United States in Celestaire's challenge of the Customs Service's classification of imported marine sextants as "optical navigational instruments" (Harmonized Tariff Schedules of the United States ("HTSUS") subheading 9014.80.10), dutiable at 5.6% ad valorem, rather than as "other non-optical navigational instruments" (HTSUS subheading 9014.80.50), which are not subject to a tariff. CIT No. 93-02-00081. This appeal was submitted for our decision following oral argument on May 7, 1997. Because we hold that (1) sextants permit, aid or enhance human vision; (2) split-image mirrors are non-subsidiary optical elements in sextants; and (3) the appeal is not controlled by *United States v. Bliss & Co.*, 6 Ct. Cust. App. 433 (1915), which concluded that under then-extant Customs law sextants were metal articles, not optical instruments, we affirm.

BACKGROUND

Celestaire imports from China the Astra IIIB Delux, a marine sextant. "A marine sextant is a hand-held instrument for measuring the angle between the lines of sight to two points by bringing into coincidence at the eye of the observer the direct ray from one point, and a double-reflected ray from the other, the measured angle being twice the angle between the reflected surfaces." Nathaniel Bowditch, *American Practical Navigator* 408 (1984).

When the sextant is vertical, and the observer is facing directly towards the sun (or other celestial body), the sun's reflected image appears at the center of a split-image mirror, half on the silvered part, half on the clear part. The index arm is then moved until the sun appears to be resting exactly on the horizon. At the instant the horizon is observed to be tangent to the disk of the sun, the time is noted and numerical val-

ues are read from the graduated arc and the micrometer drum of the sextant. The mariner then uses those figures, consulting various charts and tables, and making a series of observations, to locate his or her vessel's position.

The HTSUS contain the following classification structure:

- 9014 Direction finding compasses; *other navigational instruments* and appliances; parts and accessories thereof:
- 9014.80 Other instruments and appliances:
- 9014.80.10 *Optical instruments* * * *
- Other
- 9014.80.50 *Other* * * *

(emphasis added).

Additional U.S. Note 3 to Chapter 90 states:

For the purpose of this chapter, the terms "*optical appliances*" and "*optical instruments*" refer only to those appliances and instruments which incorporate one or more optical elements, but do not include any appliances or instruments in which the incorporated optical element or elements are solely for viewing a scale or for some other subsidiary purpose.

(emphasis in original).

DISCUSSION

Pursuant to the HTSUS, an instrument must contain optical elements to be classified as an "optical instrument." Optical elements are defined as elements which act upon, deal with, or route rays of light, see *Engis Equip. Co. v. United States*, 294 F. Supp. 964, 967 (Cust. Ct. 1969), in a way that permits or enhances human vision, see *United States v. Ataka Am., Inc.*, 550 F.2d 33, 37 (CCPA 1977). Celestaire concedes that a sextant contains at least one optical element, the split-image mirror, and that the mirror is essential to the sextant's operation. However, it disputes that the sextant's purpose is to aid human vision and argues that the mirror is merely subsidiary. Celestaire also argues that we are bound by stare decisis to follow the decision in *Bliss*, which held that sextants do not have as their purpose to aid vision and are therefore not optical instruments under the Tariff Act of 1913. We reject these arguments, which we treat in turn.

I. In determining whether the sextant is an optical instrument, we must apply the criteria set forth in *Ataka* by the Court of Customs and Patent Appeals, whose decisions are to us binding precedent:

- 1) whether the device acts on or interacts with light;
- 2) whether the device permits or enhances human vision through the use of one or more optical elements; and
- 3) whether the device uses the optical properties of the device in something more than a "subsidiary" capacity.

See 550 F.2d at 37.

As for the first *Ataka* criterion, there is no question that the sextant interacts with light, because it routes rays of light. The success of Celestaire's argument depends, then, on whether the sextant permits or enhances human vision through the use of one or more optical elements, and whether the split-image mirror (a concededly optical element essential to the functioning of the sextant) is used in a non-subsidary capacity. We hold that the sextant does and the mirror is so used.

The sextant aids and enhances human vision through its use of the split-image mirror. The split-image mirror permits a sextant user to see in the same plane two objects (the sun or other celestial body and the horizon) which actually exist in different planes. The human eye cannot do this without such optics. By providing this capability, the sextant allows the user to measure the angle between a celestial body and the horizon more accurately than could be done with the naked eye. That the end goal of sextant use—the determination of navigational position—is not visual, cannot change the physiological fact that to make the necessary measurement of the angle between the sun and the horizon, simultaneous human vision of objects in different planes must first be, and is, permitted by the mirror.

As to whether the optics are used in a subsidiary capacity, the rationale in *Ataka* provides useful guidance. In that case, a fiberscope was held to have non-subsidary optics because the "predominant use" of the fiberscope was to permit viewing of the inside of the human body, even if the ultimate use was to perform biopsies and cytological studies. The court stated:

To term optical features merely subsidiary to biopsy-cytology features, when the latter *require* the former, and when the latter are not always used and the former are always used, would be contrary to reason.

Id. at 38 (emphasis in original). This rationale applies similarly here. The split-image mirror must always be used to measure the angle and to determine navigational position. Because it is concededly essential to the functioning of the sextant, it is disingenuous to characterize the split-image mirror as used only in a "subsidiary capacity." The predominate use of the sextant is to sight the angle between the sun and the horizon even if the ultimate use is to locate position as an aid to navigation.

Our conclusion that the sextant enhances human vision through the use of its non-subsidary optical element is also consistent with the analysis in *Engis*, 294 F. Supp. 964. There, the Court of International Trade, then called the Customs Court, held that an autocollimator, "an instrument which is used to determine the flatness or straightness of a surface by obtaining angular measurements that are then converted into linear values," *Engis*, 294 F. Supp. at 965-66, made non-subsidary uses of its optical elements. The court further held that the instrument as a whole aided human vision because, although the human eye can, to some degree, determine the flatness or straightness of a surface, the autocollimator can do so more accurately. *Id.* at 969. The court noted: "[A] device,

such as an autocollimator, that assists the normal visual process in making angular determinations is unquestionably an aid to vision." *Id.* Here, as noted above, the sextant aids the vision of the user by more accurately measuring angles than he or she otherwise could.

As a further aid in determining whether the split-image mirror is "subsidiary," the context of Note 3 is helpful. Immediately before the "subsidiary purpose" language in the Note, the Note states that "instruments in which the incorporated optical element or elements are solely for viewing a scale" are not optical instruments. Here, clearly, the split-image mirror is not "solely for viewing a scale." Nor is it for any purpose that is of similar last step and low import as scale viewing. Rather, the function of the split-image mirror, to allow objects in two planes to be viewed simultaneously, is the first and most critical step in being able to determine the angular measurement and, ultimately, navigational position.

Celestaire attempts to avoid the conclusion that the use of the split-image mirror is non-subsidiary by relying on two decisions, *EAC Eng'g v. United States*, 623 F. Supp. 1255 (Ct. Int'l Trade 1985), and *Sumitomo Shoji New York, Inc. v. United States*, 64 Cust. Ct. 299 (1970), where uses of optical elements critical to the functioning of the devices were nonetheless held to be subsidiary.

These cases, however, are distinguishable. In *EAC Engineering*, the court held that spark detectors are non-optical because they detect only infrared radiation (invisible to the human eye) and therefore do not aid human vision. 623 F. Supp. at 1260. Similarly, in *Sumitomo*, the court held that a parabolic mirror was not optical because it did not aid human vision, but rather reflected light not toward human eyes, but into a light detector. 64 Cust. Ct. at 301.

II. Celestaire's final argument is that *Bliss* controls the result in this case. In *Bliss*, the Court of Customs Appeals¹ held that sextants are dutiable as articles composed chiefly of metal, under Schedule C, paragraph 167 of the Tariff Act of 1913, 38 Stat. 130 (1913), rather than as optical instruments under Schedule B, paragraph 93, 38 Stat. 122. In holding that sextants were not optical instruments, the court reasoned that the purpose of sextants was not to aid or enhance vision, but rather to measure angles in order to determine the location of a vessel at sea. 6 Ct. Cust. App. at 440. We hold that *Bliss* does not control the outcome of this appeal for two reasons: first, the test for whether an instrument is optical under *Ataka* is different from the test used in *Bliss*, and *Ataka* is binding on us; second, the court in *Bliss* was interpreting an entirely different tariff schedule, with far different categories applicable to optical instruments, and was deciding a different question than that presented here.

¹ In 1929, Congress changed the name of the Court of Customs Appeals to the Court of Customs and Patent Appeals ("CCPA"). *In re Lueders*, 111 F.3d 1569, 1575 (Fed. Cir. 1997). This court has adopted the precedent of the CCPA. *South Corp. v. United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982) (in banc).

As to the first point, *Ataka*, in contrast to *Bliss*, looks to the immediate, rather than ultimate purpose of the device. As discussed above, the immediate purpose of the sextant is to allow the user to see the sun and the horizon at the same time—an act which the user could not otherwise do. The intermediate purpose is to accurately measure angles which can only be estimated by the naked eye. It is only the ultimate purpose, to determine navigational position, that does not have to do with enhancing human vision. To the extent that *Ataka* and *Bliss* conflict, *Ataka* controls as the later issued decision because the Court of Customs and Patent Appeals always sat in banc and therefore later decisions overcome earlier inconsistent ones. See *In re Ochiai*, 71 F.3d 1565, 1569 (Fed. Cir. 1995).

As to the second point, since *Bliss* was decided in 1915, the tariff schedules have been changed and restructured no less than four times, see Tariff Act of 1922; Tariff Act of 1930; Tariff Schedules of the United States; Harmonized Tariff Schedules of the United States, and these changes have concerned tariff categories for navigational and optical instruments, including sextants. These changes in the tariff structure cast doubt on the present applicability of *Bliss* simply because the court in *Bliss* was interpreting so different a tariff schedule.

Perhaps more importantly for our analysis, however, the court in *Bliss* was deciding whether sextants were properly considered articles of metal under Schedule C (Metals and Manufactures Of), 38 Stat. 123, Paragraph 167, 38 Stat. 130, of the Tariff Act of 1913, or were properly considered "[o]pera and field glasses, [or] optical instruments" under Schedule B (Earths, Earthenware, and Glassware), 38 Stat. 120, Paragraph 93, 38 Stat. 122. Thus, the dissimilarity of sextants with opera glasses was paramount in the court's analysis. Here, the choice is between navigational instruments that are optical and those that are not, such as Loran or Global Positioning Systems, which are electronic, not optical. It is uncontested that sextants are navigational instruments; we are only asked to determine whether they are optical ones or not. Since the court in *Bliss* was asked to make a radically different determination under a completely different statutory scheme, its determination that sextants are articles "composed wholly or in chief value of * * * metal," 38 Stat. 130, and therefore not optical instruments, cannot control here.

CONCLUSION

Because a sextant aids or enhances human vision, overall, and through the use of its non-subsidary split-image mirror, and because *Bliss* is no longer good law and does not control under the present tariff laws, the decision of the Court of International Trade is

AFFIRMED.

SHARP MICROELECTRONICS TECHNOLOGY, INC., PLAINTIFF-APPELLANT *v.*
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 97-1013

(Decided September 2, 1997)

Fusae Nara, Donovan Leisure Newton & Irvine, of New York, New York, argued for plaintiff-appellant. With him on the brief were *Peter J. Gartland* and *David S. Versfelt*.

Amy M. Rubin, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, International Trade Field Office, of New York, New York, argued for defendant-appellee. With her on the brief were *Frank W. Hunger*, Assistant Attorney General, and *David M. Cohen*, Director, Department of Justice, of Washington, D.C., and *Joseph I. Liebman*, Attorney in Charge, and *Chi S. Choy*, International Trade Field Office, of New York, New York.

Appealed from: United States Court of International Trade.
Judge WALLACH.

Before CLEVENGER, RADER, and BRYSON, *Circuit Judges.*

CLEVENGER, *Circuit Judge.*

Sharp Microelectronics Technology, Inc. (Sharp) appeals from the judgment of the Court of International Trade upholding the classification by the United States Customs Service (Customs) of Sharp's imported glass cells as "[l]iquid crystal devices not constituting articles provided for more specifically in other headings * * * Other devices * * * Other," under the Harmonized Tariff Schedule of the United States (HTSUS), subheading 9013.80.60. *Sharp Microelectronics Tech., Inc. v. United States*, 932 F. Supp. 1499 (Ct. Int'l Trade 1996). Exercising our jurisdiction under 28 U.S.C. § 1295(a)(5) (1994), we affirm.

I

The imported glass cells at issue in this case consist of two pieces of processed glass with a layer of liquid crystal material injected between them. Together, the materials are referred to as "display glass," which displays text and graphics created from coded signals received by the display glass from the central processing unit of an automatic data processing machine. The parties have stipulated that the only use for the imported items is as parts for the display screens of computers.

Subheading 9013.80.60 of the HTSUS reads in relevant part:

9013	Liquid crystal devices not constituting articles provided for more specifically in other headings, * * *:
9013.80	Other devices, appliances and instruments:
9013.80.60	Other.

The duty attached to such articles is 9 percent.

The Explanatory Note to heading 9013 provides in relevant part:

This heading includes:

- (1) Liquid crystal devices consisting of a liquid crystal layer sandwiched between two sheets or plates of glass or plastics,

whether or not fitted with electrical connections, presented in the piece or cut to special shapes and not constituting articles described more specifically in other headings of the Nomenclature * * *.

When Customs classified Sharp's display glass under subheading 9013.80.60, Sharp disagreed, arguing that the subject entries should instead be classified under subheading 8473.30.40 (parts and accessories of machines of automatic data processing machines), or subheading 8471.92.30 (input or output display units of automatic data processing machines), or subheading 8531.20.00 (indicator panels incorporating liquid crystal devices). After the contested entries were liquidated pursuant to Customs' classification, Sharp filed a timely protest. Upon Customs' denial of the protest, Sharp brought suit in the Court of International Trade.

II

On stipulated facts, the parties filed cross motions for summary judgment in the Court of International Trade. Sharp did not pursue its contention that the display glass should be classified under subheading 8531.20.00, and it does not appeal from the judgment that the display glass cannot be classified under subheading 8471.92.30. Consequently, we will visit the decision of the Court of International Trade only insofar as it relates to Sharp's contention that the display glass must be classified under subheading 8473.30.40 and to Customs' stance that the proper classification provision is subheading 9013.80.60.

Because Sharp's display glass fits the description of liquid crystal devices contained in heading 9013 and the Explanatory Note thereto, the Court of International Trade proceeded to determine whether the articles in question are "provided for more specifically in other headings," that being the relevant question posed on the face of heading 9013. Since the alternative subheading proposed by Sharp is a parts provision, the Court of International Trade first considered whether the display glass falls within the terms of subheading 8473.30.40, which provides in relevant part:

8473.30 Parts and accessories of the machines of heading 8471
 [automatic data processing machines]:

8473.30.40 Not incorporating a cathode ray tube

After concluding that the display glass is an integral component of a finished automatic data processing machine without which it would not operate as intended, and that the use of Sharp's display glass at, or immediately before, the date of importation is solely or principally for use in automatic data processing machines, the Court of International Trade decided that Sharp's display glass can be described as a part of an automatic data processing machine. The government does not challenge that particular decision.

Next, the Court of International Trade considered whether Sharp's display glass is provided for more specifically in the parts provision than it is in the liquid crystal devices provision. For two reasons, the Court of

International Trade concluded that the parts provision does not more specifically describe Sharp's display glass.

First, the Court of International Trade resorted to Note 1(m) of Section XVI of the HTSUS, which provides that "[t]his section [which includes chapter 84 and thus subheading 8473.30.40] does not cover * * * Articles of Chapter 90 [including subheading 9013.80.60]." Note 1(m) thus states a rule of interpretation that articles which are described in Chapter 90 cannot be classified in Chapter 84. Having concluded previously that Sharp's display could be classified either as a liquid crystal device or as a part of an automatic data processing machine—the choice dependent only on whether the parts provision more specifically describes the articles—the court read Note 1(m) to deflect Sharp's display glass from the embrace of the parts provision. In essence, the court deemed Note 1(m) to preclude more specific provision for the display glass in the parts subheading.

Second, the court concluded that even if Note 1(m) does not answer the question of whether the parts provision is more specific than the liquid crystal device provision, the same result would obtain in a straightforward relative specificity analysis mandated by the terms of heading 9013. To perform that analysis, the court stated that it must look to the provision with "requirements which are more difficult to satisfy and which describe the article with the greatest degree of accuracy and certainty," citing *Amersham Corp. v. United States*, 564 F. Supp. 813, 824 (Ct. Int'l Trade 1983). The court also noted "in passing" that the relative specificity analysis it was undertaking was mandated by heading 9013 ("not * * * provided for more specifically in other headings") and General Rules of Interpretation (GRI) 1 of the HTSUS and not by GRI 3(a) ("The heading which provides the most specific description shall be preferred to headings providing a more general description."). Finally, in order to complete its relative specificity analysis, the court referred to Additional U.S. Rule of Interpretation 1(c), which provides that "a provision for 'parts' or 'parts and accessories' shall not prevail over a specific provision for such part or accessory."

With those interpretative tools in hand, the court concluded that Sharp's display glass, except for the relative specificity consideration, is precisely described by heading 9013 and the Explanatory Note thereto, thus satisfying the accuracy and certainty tests. Turning to the parts provision, the court concluded that it is less difficult to satisfy because it is "easier to be classified as a part or accessory of any of the machines enumerated above than it is to be a liquid crystal device." 932 F. Supp. at 1507. In response to Sharp's argument that, as a general proposition, a parts provision will prevail over a basket provision, the court invoked Rule 1(c), noting that even if subheading 9013.80.60 were treated as a basket provision, it nonetheless more specifically describes the display glass than the parts provision, and hence displaces the general rule that a parts provision will prevail over a basket provision. *Id.* at 1507-08 n.7.

III

We review the trial court's grant of summary judgment for correctness as a matter of law. See *Mita Copystar America v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994). Because the central issue here concerns the legal scope of the pertinent classification terms, and because such issue is a question of law, we review the issue *de novo*. See *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 493 (Fed. Cir. 1997) ("On questions of law, we defer to neither Customs' nor the Court of International Trade's interpretations; we decide such questions afresh."); *Rollerb-lade, Inc. v. United States*, 112 F.3d 481, 484 (Fed. Cir. 1997) ("[N]o deference attaches to Customs' classification decisions * * * where there are no disputed issues of material fact.").

Sharp has timely appealed the judgment of the Court of International Trade. Sharp contends that the Court of International Trade erred in three regards. First, it argues that heading 9013 is a genuine basket provision, and that under traditional rules of interpretation in classification cases, a parts provision must prevail over a basket provision, when the articles in question are described by both provisions. Second, Sharp faults the relative specificity analysis conducted by the Court of International Trade. On the second point, we perceive two lines of criticism. First, Sharp argues that the court misapplied Note 1(m) in conducting its relative specificity analysis. Second, Sharp thinks the court compared the wrong headings while conducting its analysis, and thereby erred in finding heading 9013 more specific, with regard to the articles in question, than heading 8473. Sharp's third ground of error resorts to the history of heading 9013, and concludes that the heading cannot cover a liquid crystal device which is destined for use in a computer screen. To these matters we now turn.

A

The government acknowledges that under customs practice before the HTSUS, a general rule provided that parts provisions prevail over basket provisions. See, e.g., *Ideal Toy Corp. v. United States*, 433 F.2d 801, 803-04 (CCPA 1970). Further, the government contends that items under the previous Tariff Schedules of the United States (TSUS) were characterized as "baskets" when they employed the terms "not specially provided for" or described in a sweeping manner several categories of merchandise (such as "on-farm equipment for the handling or drying of agricultural or horticultural products"—item 666.00, TSUS). The government also acknowledges that "basket" provisions abound in the HTSUS, even when using language differing from that which was customary under the TSUS. For example, the government cites as HTSUS "baskets": "other" threaded articles in subheading 7318.19.00, "other" food preparations in subheading 2106.90.60, and "machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter" in heading 8479. The government notes that heading 8479 was described in passing as a "basket" in our opinion in *Hemscheidt Corp. v. United States*, 72 F.3d 868, 869 (Fed. Cir.

1995), even though whether the provision is indeed a basket was not an issue *sub judice*.

In this case, we need not decide whether or where one might find a basket provision in the HTSUS, or whether the previous general rule that parts provisions prevail over basket provisions will acquire such status after case-by-case application under the HTSUS. Those matters, while important, are beyond our reach in this case, because we conclude that heading 9013 is not a basket provision. We reach that conclusion not so much because heading 9013 uses "specifically" instead of "specially," as the TSUS did, but more so because heading 9013 itself invites a relative specificity analysis whenever an article is susceptible of description under heading 9013 and another heading or subheading. Heading 9013 thus provides a specific home, not a basket, for defined articles, indeed for the very liquid crystal devices imported by Sharp. The provision then acknowledges that the same article specifically defined therein might be found with an even more specifically described home elsewhere in the schedule. We therefore decline Sharp's invitation to treat such a provision as a basket; it instead is simply another specific provision acknowledging that it may be more or less difficult to satisfy than some other provision, or a more or less accurate or certain provision than some other to describe a particular article.

Because we conclude that heading 9013 is not a "basket" over which a parts provision might prevail, we reject Sharp's initial attack on the decision of the Court of International Trade.

B

With regard to the relative specificity analysis conducted by the Court of International Trade, Sharp first disagrees with the court's employment of Note 1(m). On this point, Sharp prevails. As we noted above, the Court of International Trade in essence used Note 1(m) as a "tie-breaker" in concluding that subheading 9013.80.60 is more specific than the parts provision in subheading 8473.30.40. Sharp argues that such use of Note 1(m) means that whenever an article could fit under Chapter 90 or Chapter 84, Chapter 90 would prevail, even if the heading or subheading under Chapter 90 also included an article that is more specifically provided for in Chapter 84, and the particular article in dispute unquestionably is more specifically provided for under Chapter 84. Sharp's argument illustrates the error in employing Note 1(m) as an analytical tool before one first decides if an article is classifiable under heading 9013. If one determines that a liquid crystal device belongs in heading 9013 because it is not more specifically captured elsewhere in the schedule, then Note 1(m) complements the rule of relative specificity by excluding the device from classification in Chapter 84. If Note 1(m) instead supplies the answer to the relative specificity analysis, as the Court of International Trade held, and as the government urges us to hold, then the need for a meaningful specificity analysis vanishes. We prefer the complementary role which we assign to Note 1(m) in the setting of this case.

As its second line of attack on the court's relative specificity analysis, Sharp contends in its opening brief that the court mixed apples and oranges, so to speak, in conducting its analysis. Sharp faults the court for having compared heading 9013 (liquid crystal devices) with heading 8473 (parts and accessories for use with machines of headings 8469 to 8471) in determining that heading 8473, by providing home for so many disparate parts, is less specific than the precise liquid crystal device provision found in heading 9013. In reply, the government notes that Sharp's purported support for its complaint is misplaced, in that Sharp only relied on a definitional provision which provides that a "reference to 'headings' encompasses subheadings indented thereunder." Sharp could point to no rule of interpretation faulting the court's comparison of heading to heading. Instead, Sharp has receded in this argument, stating in its reply brief that "[c]ontrary to the Government's description, SMT [Sharp] does not contend that the CIT 'should have compared the four digit heading 9013 with the six digit subheading 8473.30'". We thus reject Sharp's challenge to the trial court's relative specificity analysis which concluded that the parts provision is less specific than heading 9013.

C

Sharp asks us to refer to the history of the current HTSUS heading 9013 provision, a subject described at some length in the opinion of the Court of International Trade. *See* 932 F. Supp. at 1502-03. In brief, when Congress adopted the HTSUS through the enactment of the Omnibus Trade and Competitiveness Act of 1988, it did not comment on the scope of heading 9013. *See* Pub. L. No. 100-418, §§ 1201, 1204, 102 Stat. 1107, 1147-50 (1988). For the history of the HTSUS, however, we have the record of the workings of the Nomenclature Committee and the Harmonized System Committee of the Customs Cooperation Council. Among the papers of those committees are found the origins of heading 9013, and various proposals for its language and purpose.

Heading 9013 in the beginning did not contain any reference to liquid crystal devices. Focus on liquid crystal displays occurred in 1979 during discussions on how to classify such displays used with electric clocks and watches, which were equally susceptible to classification under contemplated chapters 85 and 90. As the Court of International Trade explained in its opinion, the Committee determined that liquid crystal displays should be classified as much as possible under a single heading, while leaving finished articles incorporating such displays in their particular appropriate headings. Thus, the overall emerging design for heading 9013 would exclude therefrom finished articles using the properties of liquid crystals, when expressly covered in another provision, and include indeterminate or general use liquid crystal devices. In one of the Committee documents, discussing the idea of leaving finished articles in their appropriate headings, the idea was expressed that "[t]he same applies to parts identifiable as being specially designed for a specific machine or apparatus."

From this history, Sharp argues that heading 9013 only provides a home for liquid crystal devices of indeterminate or general use, and that such devices, when identifiable as parts for a specific machine, cannot be classified under heading 9013. Sharp bolsters this argument by reference to the holding of the Court of International Trade, made during its consideration of whether Sharp's display glass qualifies as a part under heading 8473, that Sharp's display glass is indeed a part for a specific use, namely for a machine described in heading 8473. That particular holding, Sharp maintains, must mean that its imported display glass cannot be a liquid crystal device of indeterminate or general use. To state Sharp's argument reveals a measure of appeal, but we must reject it, for several reasons.

First, the history on which Sharp relies, in particular memorandum of Committee sessions, precedes Congressional consideration of what became heading 9013. That history, while interesting and informative, is not binding on the courts, and in the end is overwhelmed by the specific language of heading 9013, which fails to accommodate the fine points Sharp draws from the history. *Cf. Lonza, Inc. v. United States*, 960 F. Supp. 374, 380 n.11 (Ct. Int'l Trade 1997) (Although the Explanatory Notes are the official interpretation of the scope of the Harmonized Commodity Description and Coding System (which served as the basis of the HTSUS) as viewed by the Customs Cooperation Council, the international organization that drafted that nomenclature, the Explanatory Notes do not constitute controlling legislative history.). Heading 9013 and its Explanatory Note instead create a heading that embraces Sharp's display glass, so long as it is not described more specifically in other headings. The terms of heading 9013 require a relative specificity analysis for squaring heading 9013 with other headings, and GRI 1 mandates that "classification shall be determined according to the terms of the headings * * *." Additional U.S. Rule of Interpretation 1(c) further provides a tool to assist in finding the correct classification home for articles, such as those in issue, for which two headings compete. We thus can identify a symmetry in the HTSUS which accommodates heading 9013 and the interpretative guides of the HTSUS, and which provides a reasonable answer to the classification question posed in this case. We think that symmetry is dislodged and its components discounted too much by Sharp's history argument, which we decline to credit in the dispositive fashion urged by Sharp.

IV

In conclusion, we hold that the Court of International Trade correctly determined that the articles in question are to be classified under sub-heading 9013.80.60. The decision of that court is therefore affirmed.

No costs.

AFFIRMED

A CLASSIC TIME, BRANDED TIME CORP., EASTMAN WATCH CO., F & K WATCH CO., INC., OMNI QUARTZ, LTD., ACCUTIME WATCH CORP., DELTA IMPLEX WATCH CORP., AND ANCHOR TIME CORP., PLAINTIFFS-APPELLANTS v. UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 97-1054, 97-1056, 97-1057, 97-1058,
97-1059, 97-1060, 97-1061, and 97-1062

(Decided September 2, 1997)

Steven R. Sosnov, Sosnov & Associates, of Norristown, Pennsylvania, argued for plaintiffs-appellants. With him on the brief were *Irving A. Mandel*, and *Jeffrey H. Pfeffer*, of New York, New York.

James A. Curley, Attorney, Commercial Litigation Branch, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Frank W. Hunger*, Assistant Attorney General, and *David M. Cohen*, Director, of Washington, D.C., and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, of New York, New York.

Appealed from: United States Court of International Trade.

Judge AQUILINO, JR.

Before *MAYER, MICHEL*, and *RADER*, *Circuit Judges*.

MAYER, Circuit Judge.

A Classic Time, Branded Time Corp., Eastman Watch Co., F & K Watch Co., Inc., Omni Quartz, Ltd., Accutime Watch Corp., Delta Implex Watch Corp., and Anchor Time Corp. (collectively "Classic Time") appeal the judgment of the United States Court of International Trade, granting summary judgment for the United States. 942 F. Supp. 589 (Ct. Int'l Trade 1996). We affirm.

BACKGROUND

The United States Customs Service required Classic Time to enter electrical timepieces under Schedule 7 of the Tariff Schedules of the United States, instead of Schedule 6, despite several contrary judgments pertaining to similar timepieces. *Texas Instruments, Inc. v. United States*, 518 F. Supp. 1341 (Ct. Int'l Trade 1981), *aff'd*, 673 F.2d 1375 (CCPA 1982); *Belfont Sales Corp. v. United States*, 666 F. Supp. 1568 (Ct. Int'l Trade 1987), *reh'g denied*, 698 F. Supp. 916 (Ct. Int'l Trade 1988), *aff'd*, 878 F.2d 1413 (Fed. Cir. 1989). After we affirmed *Belfont*, Customs liquidated Classic Time's entries under Schedule 7 and refunded the difference in duties between the two Schedules, without refunding the interest on this difference.

Classic Time filed a complaint in the Court of International Trade, alleging that Customs deprived it of property without due process of law by forcing Classic Time to tender excess duties under a higher tariff schedule, by not liquidating the entries or processing Classic Time's protests in the normal administrative fashion, and by depriving Classic Time of its property right to interest on duty refunds from the date the summons would have been filed. The United States filed a motion to dismiss the complaint for failure to state a claim under local Rule 12(b)(5).

The Court of International Trade treated this motion as a motion for summary judgment, in light of evidence submitted by both parties, and granted the motion.

DISCUSSION

On appeal, Classic Time once again argues that Customs deprived it of property without due process of law by not permitting entry of these goods under Schedule 6 in view of *Texas Instruments* and the trial court decision in *Belfont*, and that upon liquidation at the lower rate under Schedule 6, Customs was required to tender interest on the refund of excess estimated duties from the date the summons would have been filed. Since there are no factual disputes involved in this appeal, we review the summary judgment of the Court of International Trade for correctness as a matter of law. *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed. Cir. 1997). Our review is limited to the law as it existed prior to December 8, 1993, when Section 642 of the North American Free Trade Agreement Implementation Act amended the relevant interest accruing sections of Title 19, Pub. L. No. 103-182, 107 Stat. 2057 (codified as amended in scattered sections of 19 U.S.C.).

As the trial court explained, the Constitution does not provide a right to import merchandise under a particular classification or rate of duty. *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 318 (1933); *North American Foreign Trading Corp. v. United States*, 783 F.2d 1031, 1032 (Fed. Cir. 1986) ("No vested right to a particular classification or rate of duty or preference is acquired at the time of importation."). Nor does the Constitution require the government to pay interest on monies legally collected and held pending post-enforcement review, cf. *Bob Jones University v. Simon*, 416 U.S. 725, 747 (1974), and any subsequent appellate proceedings. Thus, we agree that this case presents neither a violation of fundamental rights, nor a deprivation of property without due process.

Customs is under no constitutional or statutory obligation to accept a deposit of estimated duties that is based on the importer's own estimation, when Customs estimates otherwise. From the very beginning, Congress has set forth a clear scheme for the collection of duties on imports, which gives Customs, and not importers, the discretion to estimate duties. See 19 U.S.C. § 3 (1994) ("The Secretary of the Treasury shall direct the superintendence of the collection of the duties on imports as he shall judge best."); see also *id.* § 1505(a) (1984) ("the importer of record shall deposit with the appropriate customs officer at the time of making entry, or at such later time as the Secretary may prescribe by regulation (but not to exceed thirty days after the date of entry), the amount of duties estimated by such customs officer to be payable thereon."). We have consistently interpreted these sections of Title 19 to mean that the Secretary, and through him the Commissioner, has

* But for excision of the words "and tonnage," which followed the words "duties on imports," this language has not changed since 1792.

the "discretionary authority to determine when, how, and how much duty is to be collected." *National Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1554-55 (Fed. Cir. 1988).

In exercising this authority to implement uniform practices, Customs has promulgated 19 C.F.R. § 141.103 (1988), which states: "Estimated duties shall be deposited in an amount deemed necessary by the district director to sufficiently cover the prospective duties on each item being entered or withdrawn." As used here, this regulation is valid and consistent with Congress' grant of discretionary authority. Therefore, Customs is entitled to estimate duties under one Schedule so as to "sufficiently cover the prospective duties," pending appellate review of an existing judgment that directs entry under a lower tariff Schedule.

Finally, for the reasons set out in *Kalan, Inc. v. United States*, 944 F.2d 847, 849-50 (Fed. Cir. 1991) (interpreting 19 U.S.C. §§ 1505 and 1520** as requiring Customs to pay interest on refunds of increased and additional duties assessed at liquidation, but not on the refund of excess estimated duties deposited when entered), we cannot agree with Classic Time that it had a property right to interest accruing on its overpayment of estimated duties.

CONCLUSION

Accordingly, the judgment of the Court of International Trade is affirmed.

AFFIRMED

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

MENTOR GRAPHICS CORP. AND META SYSTEMS, APPELLANTS *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE, AND QUICKTURN DESIGN SYSTEMS, INC., INTERVENOR

Appeal No. 97-1106

(Decided August 15, 1997)

Before MICHEL, PLAGER and BRYSON, *Circuit Judges*.

PER CURIAM.

Mentor Graphics Corporation and Meta Systems appeal the decision of the United States International Trade Commission granting temporary relief to Quickturn Design Systems, Inc. in the form of temporary exclusion and temporary cease and desist orders prohibiting importa-

** As noted above, on December 8, 1993, Section 642 of the North American Free Trade Agreement Implementation Act amended these sections of Title 19 to require certain payments of interest.

tion of certain hardware logic emulation systems. Investigation No. 337-TA-383, August 9, 1996. By agreement, the appeal turns on the proper construction of certain disputed terms in the three asserted claims. The operation and structure of the accused device are neither uncertain nor disputed. In sum, we adopt the claim construction of the Commission which was correct and derived according to our case law on appropriate methodology. Therefore, on the basis of the analysis of the meaning of the disputed claim terms set forth in the thorough and careful opinion of Administrative Law Judge Paul J. Luckern, we *affirm*.

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
R. Kenton Musgrave

Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson
Herbert N. Maletz
Bernard Newman
Dominick L. DiCarlo
Nicholas Tsoucalas

Clerk

Raymond F. Burghardt



Rules of the U.S. Court of International Trade

EFFECTIVE NOVEMBER 1, 1980

(AS AMENDED, [MARCH 31, 1996] NOVEMBER 1, 1997)

Amendments to Rules 3 and 89, and the Schedule of Fees

August 29, 1997

Effective Date:
November 1, 1997

NOTICE OF AMENDMENTS TO THE RULES OF THE UNITED STATES COURT OF INTERNATIONAL TRADE

The Court, on August 29, 1997, approved certain amendments to the Rules of the United States Court of International Trade, which will become effective November 1, 1997. The Rules affected by these changes are: Rules 3 and 89, and the Schedules of Fees.

Copies of the amendments were transmitted to the following sources for publication:

Bureau of National Affairs, Inc.
Electronic Publishing
Fuglei & Associates (Customs Info)
Gould Publications
International Business Reports (Customs Record)
Lawyers Co-operative Publishing Co.
Legi-slate, Inc.
Matthew Bender & Co.
Mead Data Central (LEXIS)
Oceana Publications, Inc.
Office of the Law Revision Counsel (United States Code)
Rules Service Company
Shepard's/McGraw-Hill
United States Customs Service
Want Publishing Company
West Publishing Company (United States Code Annotated)

If you have obtained a copy of the Rules from a commercial publisher, you may wish to communicate with that publisher to determine when the amendments will be available.

A copy of the amendments is available for examination in the Court's Library and the Case Management Section.

Dated: October 10, 1997.

RAYMOND F. BURGHARDT,
Clerk of the Court.

CLERK OF THE COURT

[Joseph E. Lombardi]

Raymond F. Burghardt

CLERK'S OFFICE BUSINESS HOURS

8:30 a.m. to 5:00 p.m. daily, except Saturdays, Sundays, and legal holidays. (See Rule 6(a) for legal holidays.)

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CHIEF JUDGE

[Dominick L. DiCarlo]

Gregory W. Carman

JUDGES

[Gregory W. Carman]

Jane A. Restani

Thomas J. Aquilino, Jr.

[Nicholas Tsoucalas]

R. Kenton Musgrave

Richard W. Goldberg

Donald C. Pogue

Evan J. Wallach

SENIOR JUDGES

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

Amendment to Rule 3

Rule 3 is amended as follows:

RULE 3. COMMENCEMENT OF ACTION

(a) *Commencement.* * * *

(b) *Filing Fee.* When an action is commenced, a [\$120] \$150 filing fee shall be paid to the clerk of the court, except that [a \$25 filing fee shall be paid when the action is one described in 28 U.S.C. § 1581(d)(1).]

(1) a \$120 filing fee shall be paid when the action is one described in 28 U.S.C. § 1581(a), and

(2) a \$25 filing fee shall be paid when the action is one described in 28 U.S.C. § 1581(d)(1).

(c) *Complaint Fee.* When a complaint is filed in an action described in 28 U.S.C. § 1581(a), a \$30 fee shall be paid to the clerk of the court.

(e) (d) *Information Statement.* * * *

(d) (e) *Amendment of Summons.* * * *

(e) (f) *Notice to Interested Parties.* * * *

(f) (g) *Precedence of Action.* * * *

PRACTICE COMMENT: * * *

PRACTICE COMMENT: * * *

PRACTICE COMMENT: * * *

PRACTICE COMMENT: * * *

PRACTICE COMMENT: * * *

(As amended Nov. 4, 1981, eff. Jan. 1, 1982; July 21, 1986, eff. Oct. 1, 1986; Dec. 3, 1986, eff. Mar. 1, 1987; Sept. 25, 1992, eff. Jan. 1, 1993; Nov. 29, 1995, eff. Mar. 31, 1996; Aug. 29, 1997, eff. Nov. 1, 1997.)

Amendments to Rule 89

Rule 89 is amended as follows:

RULE 89. EFFECTIVE DATE

(a) *Effective Date of Original Rules.* * * *

(b) *Effective Date of Amendments.* * * *

(c) *Effective Date of Amendments.* * * *

(d) *Effective Date of Amendments.* * * *

(e) *Effective Date of Amendments.* * * *

(f) *Effective Date of Amendments.* * * *

(g) *Effective Date of Amendments.* * * *

(h) *Effective Date of Amendments.* * * *

(i) *Effective Date of Amendments.* * * *

(j) *Effective Date of Amendments.* * * *

(k) *Effective Date of Amendments.* * * *

(l) *Effective Date of Amendments.* * * *

(m) *Effective Date of Amendments.* * * *

(n) *Effective Date of Amendment.* * * *

(o) *Effective Date of Amendments.* * * *

(p) *Effective Date of Amendments.* The amendments adopted by the court on August 29, 1997 shall take effect on November 1, 1997. They govern all proceedings in actions brought on or after they take effect.

(Added Nov. 4, 1981, eff. Jan. 1, 1982; and amended Dec. 29, 1982, eff. Jan. 1, 1983; Oct. 3, 1984, eff. Jan. 1, 1985; June 19, 1985, eff. Oct. 1, 1985; July 21, 1986, eff. Oct. 1, 1986; Dec. 3, 1986, eff. Mar. 1, 1987; Apr. 28, 1987, eff. June 1, 1987; July 28, 1988, eff. Nov. 1, 1988; Oct. 3, 1990, eff. Jan. 1, 1991; Mar. 1, 1991, eff. Mar. 1, 1991; Sept. 25, 1992, eff. Jan. 1, 1993; Oct. 5, 1994, eff. Jan. 1, 1995; June 1, 1995, eff. June 1, 1995; Nov. 29, 1995, eff. Mar. 31, 1996; Aug. 29, 1997, eff. Nov. 1, 1997.)

Amendment to Schedule of Fees

The Schedule of Fees is amended as follows:

SCHEDULE OF FEES

(Effective November 1, 1988, as amended [June 2, 1995] November 1, 1997)

*	*	*	*	*	*	*
<i>Filing Fees—USCIT R. 3(b)</i>						
1.	For filing an action other than one commenced under 28 U.S.C. § 1581(a) or (d)(1)	\$ [120.00]	150.00			
2.	For filing an action commenced under 28 U.S.C. § 1581(a)		120.00			
[2] 3.	For filing an action commenced under 28 U.S.C. § 1581(d)(1)		25.00			
[3] 4.	For filing a complaint in an action commenced under 28 U.S.C. § 1581 (a) or (b) prior to March 1, 1987		25.00			
5.	For filing a complaint in an action commenced under 28 U.S.C. § 1581(a) on or after November 1, 1997		30.00			

*Attorney Admission Fees—USCIT R. 74(b)(3)**Additional Fees—USCIT R. 80(g)*

PRACTICE COMMENT: ***

APPENDIX I

SEARCH FEE GUIDELINES

Introduction

*	*	*	*	*	*	*
Guideline No. 1	*	*	*	*	*	*
Guideline No. 2	*	*	*	*	*	*
Guideline No. 3	*	*	*	*	*	*
Guideline No. 4	*	*	*	*	*	*
Guideline No. 5	*	*	*	*	*	*

APPENDIX II

ADVISORY NOTE

* * * * *

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